Alex 31 Kaimes — 1
c4

HISTORICAL

LAW-TRACTS.

HARVARD LAW SCHOOL LIBRARY.

The FOURTH EDITION.

With ADDITIONS and CORRECTIONS.

By Lord Kames (Henry Home)

EDINBURGH:

Printed for T. CADELL, in the Strand, London; and BELL & BRADFUTE, and W. CREECH, Edinburgh.

MDCCXCII.

S
UK
905
KAM

COW

Alex. L Robertson 46 Geo. street

4x
H7658
vol 4

PREFACE.

THE hiſtory of man is a delightful ſubject. A rational enquirer is no leſs entertained than inſtructed, in tracing the progreſs of manners, of laws, of arts, from their birth to their preſent maturity. Events and ſubordinate incidents are, in each of theſe, linked together, and connected in a regular chain of cauſes and effects. Law in particular, becomes then only a rational ſtudy, when it is traced hiſtorically, from its firſt rudiments among ſavages, through ſucceſſive changes, to its higheſt improvements in a civilized ſociety. And yet the ſtudy is ſeldom conducted in that manner. Law, like geography, is taught as if it were a collection of facts merely: the memory is employed to the full, rarely the judgment. This method, were it not rendered familiar by cuſtom, would appear ſtrange and unaccountable.

With reſpect to the political conſtitution of Britain, how imperfect muſt the knowledge be of that man who confines his reading to the preſent times? If he follow the ſame method in ſtudying its laws, have we reaſon to hope that his knowledge of them will be more perfect?

SUCH neglect of the hiſtory of law, is the more ſtrange, that in place of a dry, intricate, and crabbed ſcience, law treated hiſtorically becomes an entertaining ſtudy; entertaining not only to thoſe whoſe profeſſion it is, but to every perſon who hath any thirſt for knowledge. With the generality of men, it is true, the hiſtory of law makes not ſo great a figure, as the hiſtory of wars and conqueſts. Singular events, which by the prevalence of chance or fortune excite wonder, are much reliſhed by the vulgar. But readers of ſolid judgment find more entertainment, in ſtudying the conſtitution of a ſtate, its government, its laws, the manners of its people;

people; where reaſon is exerciſed in diſcovering cauſes and tracing effects through a long train of dependencies.

THE hiſtory of law, in common with other hiſtories, enjoys the privilege of gratifying curioſity. It enjoys beſide ſeveral peculiar privileges. The feudal cuſtoms ought to be the ſtudy of every man who propoſes to reap inſtruction from the hiſtory of modern European nations: becauſe among theſe nations, public tranſactions, no leſs than private property, were ſome centuries ago regulated by the feudal ſyſtem. Sovereigns formerly were many of them connected by the relation of ſuperior and vaſſal. The King of England, for example, held of the French King many fair provinces. The King of Scotland, in the ſame manner, held many lands of the Engliſh King. The controverſies among theſe princes were generally feudal; and without a thorough knowledge of the feudal ſyſtem, one muſt be ever at a loſs

in forming any accurate notion of ſuch controverſies, or in applying to them the ſtandard of right and wrong.

THE feudal ſyſtem is connected with the municipal law of this iſland, ſtill more than with the law of nations. It formerly made the chief part of our municipal law, and in Scotland to this day makes ſome part. In England, indeed, it is reduced to a ſhadow. Yet, without excepting even England, much of our preſent practice is evidently derived from it. This conſideration muſt recommend the feudal ſyſtem, to every man of taſte who is deſirous to acquire the true ſpirit of law.

BUT the hiſtory of law is not confined to the feudal ſyſtem. It comprehends particulars without end, of which one additional inſtance ſhall at preſent ſuffice. A ſtatute, or any regulation, if we confine ourſelves to the words, is ſeldom ſo perſpicuous as to prevent errors, perhaps groſs ones.

ones. In order to form a juſt notion of any ſtatute, and to diſcover its ſpirit and intendment; we ought to be well informed how the law ſtood at the time, what defect was meant to be ſupplied, or what improvement made. Theſe particulars require hiſtorical knowledge; and therefore, with reſpect to ſtatute-law at leaſt, ſuch knowledge appears indiſpenſable.

In the foregoing reſpects, I have often amuſed myſelf with a fanciful reſemblance of law to the river Nile. When we enter upon the municipal law of any country in its preſent ſtate, we reſemble a traveller, who, croſſing the Delta, loſes his way among the numberleſs branches of the Egyptian river. But when we begin at the ſource and follow the current of law, it is in that courſe no leſs eaſy than agreeable; and all its relations and dependencies are traced with no greater difficulty, than are the many ſtreams into which that magni-

ficent river is divided before it is loſt in the ſea.

An author, in whoſe voluminous writings not many things deſerve to be copied, has however handled the preſent ſubject with ſuch ſuperiority of thought and expreſſion, that in order to recommend the hiſtory of law, I will cite the paſſage at large. "I might inſtance (ſays he) in o-
"ther profeſſions the obligation men lie
"under of applying themſelves to certain
"parts of hiſtory, and I can hardly for-
"bear doing it in that of the law, in its
"nature the nobleſt and moſt beneficial to
"mankind, in its abuſe and debaſement
"the moſt ſordid and the moſt pernicious.
"A lawyer now is nothing more, I ſpeak
"of ninety-nine in a hundred at leaſt, to
"uſe ſome of Tully's words, *niſi leguleius*
"*quidem cautus, et acutus praeco actionum,*
"*cantor formularum, auceps ſyllabarum.*
"But there have been lawyers that were
"orators, philoſophers, hiſtorians: there
"have

" have been Bacons and Clarendons.
" There will be none ſuch any more, till
" in ſome better age, true ambition or
" the love of fame prevails over avarice;
" and till men find leiſure and encourage-
" ment to prepare themſelves for the ex-
" erciſe of this profeſſion, by climbing up
" to the *vantage ground*, ſo my Lord Ba-
" con calls it, of ſcience, inſtead of gro-
" veling all their lives below, in a mean,
" but gainful, application to all the little
" arts of chicane. Till this happen, the
" profeſſion of the law will ſcarce deſerve
" to be ranked among the learned pro-
" feſſions: and whenever it happens, one
" of the vantage grounds to which men
" muſt climb, is metaphyſical, and the
" other, hiſtorical knowledge. They muſt
" pry into the ſecret receſſes of the hu-
" man heart, and become well acquainted
" with the whole moral world, that they
" may diſcover the abſtract reaſon of all
" laws: and they muſt trace the laws of
" particular ſtate, eſpecially of their own,

" from

" from the firſt rough ſketches to the more " perfect draughts; from the firſt cauſes " or occaſions that produced them, through " all the effects, good and bad, that they " produced *."

THE following diſcourſes are ſelected from a greater number, as a ſpecimen of that manner of treating law which is here ſo warmly recommended. The author flatters himſelf, that they may tend to excite an hiſtorical ſpirit, if he may uſe the expreſſion, in thoſe who apply themſelves to law, whether for profit or amuſement; and for that end ſolely has he ſurrendered them to the public.

AN additional motive concurred to the ſelection here made. The diſcourſes relate, each of them, to ſubjects common to the law of England and of Scotland; and, in tracing the hiſtory of both, tend to introduce

* Bolingbroke of the Study of Hiſtory, p. 353. quarto edit.

duce both into the reader's acquaintance. I have often reflected upon it as an unhappy circumſtance, that different parts of the ſame kingdom ſhould be governed by different laws. This imperfection could not be remedied in the union betwixt England and Scotland; for what nation will tamely ſurrender its laws more than its liberties? But if the thing was unavoidable, its bad conſequences were not altogether ſo. Theſe might have been prevented, and may yet be prevented, by eſtabliſhing public profeſſors of both laws, and giving ſuitable encouragement for carrying on together the ſtudy of both. To unite both in ſome ſuch plan of education, will be leſs difficult than at firſt view may be apprehended; for the whole iſland originally was governed by the ſame law; and even at preſent, the difference conſiſts more in terms of art than in ſubſtance. Difficulties at the ſame time may be overbalanced by advantages: the propoſed plan has great advantages, not only by removing

moving or leſſening the foreſaid inconvenience, but by introducing the beſt method of ſtudying law; for I know none more rational, than a careful and judicious compariſon of the laws of different countries. Materials for ſuch compariſon are richly furniſhed by the laws of England and of Scotland. They have ſuch reſemblance, as to bear a compariſon almoſt in every branch; and they ſo far differ, as to illuſtrate each other by their oppoſition. Our law will admit of many improvements from that of England; and if the author be not in a miſtake through partiality to his native country, we are rich enough to repay with intereſt, all we have occaſion to borrow. A regular inſtitute of the common law of this iſland, deducing hiſtorically the changes which that law hath undergone in the two nations, would be a valuable preſent to the public; becauſe it would make the ſtudy of both laws a taſk eaſy and agreeable. Such inſtitute, it is true, is an undertaking too great for any

one

one hand. But if men of knowledge and genius would undertake particular branches, a general ſyſtem might in time be completed from their works. This ſubject, which has frequently occupied the author's thoughts, muſt touch every Briton who wiſhes a complete union; and a North-Briton in a peculiar manner. Let us reflect but a moment upon the condition of property in Scotland, ſubjected in the laſt reſort to judges, who have little inclination, becauſe they have ſcarce any means to acquire knowledge in our law. With reſpect to theſe judges, Providence it is true, all along favourable, hath of late years been ſingularly kind to us. But in a matter ſo precarious, we ought to dread a reverſe of fortune, which would be ſeverely felt. Our whole activity is demanded, to prevent if poſſible the impending evil. There are men of genius in this country, and good writers. Were our law treated as a rational ſcience, it would find its way into England, and be ſtudied there

for

for curioſity as well as for profit. The author, excited by this thought, has ventured to make an eſſay; which, for the good of his country more than for his own reputation, he wiſhes to ſucceed. If his Eſſay be reliſhed, he muſt hope, that writers of greater abilities will be moved to undertake other branches ſucceſſively, till the work be brought to perfection.

CONTENTS.

CONTENTS.

Tract		Pag.
I.	*Criminal Law,* - -	1
II.	*Promiſes and Covenants,* -	66
III.	*Property,* - -	88
IV.	*Securities upon land for payment of debt,*	157
V.	*Privilege of an Heir-apparent in a feudal holding to continue the poſſeſſion of his anceſtor,* -	187
VI.	*Regalities, and the privilege of Repledging,* - -	203
VII.	*Courts,* - -	223
VIII.	*Brieves,* - -	306
IX.	*Proceſs in abſence,* .	319
X.	*Execution againſt moveables and land for payment of debt,* -	338
XI.	*Perſonal Execution for payment of debt,*	355
XII.	*Execution for obtaining payment after the death of the debtor,* -	374
XIII.	*Limited and univerſal Repreſentation of Heirs,* - -	416
XIV.	*Old and New Extent,* -	431

APPENDIX.

APPENDIX.

No. Pag.

1. *Form of a letter of Slaines,* . 457

2. *Copy of a ſeiſin, which proves, that the* Jus Retractus *was the law of Scotland in the fifteenth century,* 459

3. *Copies of two Rent charges:*
   1. *Bond Sir Simon Lockhart of Ley, to William of Lindſay rector of the church of Ayr, for an annualrent of L.* 10 *Sterling out of the lands of Ley,* anno 1323, 461
   2. *Bond by James of Douglas Lord of Balvany,* - - 463

4. *Old ſtyle of letters of Poinding the Grouna, founded on the infeftment without a previous decree,* - 464

5. *Tax granted by the parliament to Robert* I. *for his life,* - - 465

6. *Lord Lile's trial,* - - 469

7. *Carta Confirmationis Gilberti Menzeis,* 470

8. *Act of Warding,* - - 474

9. *Letters of Four Forms,* - 474
   The executions written on the back, 479
   Notes of Letters of Four Forms, 482

10. *Carta Ricardi Kine,* - 484

11. *Charter of Appriſing,* - 485

HISTORICAL LAW-TRACTS.

TRACT I.

CRIMINAL LAW.

OF the human ſyſtem no part, external or internal, is more remarkable than a claſs of principles, intended obviouſly to promote ſociety, by reſtraining men from harming each other. Theſe principles, as the ſource of the criminal law, muſt be attentively examined: and to form a juſt notion of them, we need but reflect on what we feel when we commit a crime, or witneſs it. Upon certain actions, hurtful to others, the ſtamp of *impropriety* and *wrong* is impreſſed in legible characters, viſible to all, not excepting even the delinquent. Paſſing from the action to its author, we perceive that he is *guilty*; and we alſo perceive, that he ought to be puniſhed for his guilt. He himſelf, having the ſame perception, is filled with remorſe; and, which

is extremely remarkable, his remorſe is accompanied with an anxious dread that the puniſhment will be inflicted, unleſs it be prevented by his making reparation or atonement. Thus in the breaſt of a man a tribunal is erected for conſcience: ſentence paſſeth againſt him for every delinquency; and he is delivered over to the hand of Providence, to be puniſhed in proportion to his guilt. The wiſdom of this contrivance is conſpicuous. A ſenſe of wrong is of itſelf not ſufficient to reſtrain the exceſſes of paſſion: but the dread of puniſhment, which is felt even where there is no viſible hand to puniſh, is a natural reſtraint ſo efficacious, that none more perfect can be imagined *. This dread, when the reſult of atrocious or unnatural crimes, is itſelf a tremendous puniſhment, far exceeding all that have been invented by men. Happy it is for ſociety, that inſtances are rare, of crimes ſo groſs as to produce this natural dread in its higher degrees: it is, however, ſtill more rare, to find any perſon ſo ſingularly virtuous, as never to have been conſcious of it in any degree. When we peruſe the hiſtory of mankind, even in their moſt ſavage ſtate, we diſcover it to be univerſal. One inſtance I muſt mention, becauſe it relates to the Hottentots, of all men the

* Eſſays on the Principles of Morality and Natural Religion, part 1. eſſ. 2. chap. 3.

the moſt brutiſh. They adore a certain inſect as their deity; the arrival of which in a kraal, is ſuppoſed to bring grace and proſperity to the inhabitants; and it is an article in their creed, that all the offences of which they had been guilty to that moment, are buried in oblivion, and all their iniquities pardoned *. The dread that accompanies guilt, till puniſhment be inflicted or forgiven, muſt undoubtedly be univerſal, when it makes a figure even among the Hottentotes.

For every wrong, reaſon and experience make us apprehend the reſentment of the perſon injured: but the horror of mind that accompanies every groſs crime, produceth in the criminal an impreſſion that all nature is in arms againſt him. Conſcious of meriting the higheſt puniſhment, he dreads it from the hand of God, and from the hand of man: "And Cain ſaid unto the "Lord, My puniſhment is greater than I can "bear. Behold, thou haſt driven me out this "day from the face of the earth: and from thy "face ſhall I be hid, and I ſhall be a fugitive "and a vagabond in the earth, and it ſhall come "to paſs, that every one that findeth me ſhall "ſlay me †." Hence the efficacy of human puniſh-

* Kolben's Preſent State of the Cape of Good Hope, vol. 1. p. 99.

† Geneſis, iv. 13. 14.

puniſhments in particular, to which man is adapted with wonderful foreſight, through the conſciouſneſs of their being juſtly inflicted, not only by the perſon injured, but by the magiſtrate or by any one. Abſtracting from this conſciouſneſs, the moſt frequent inſtances of chaſtiſing criminals would readily be miſapprehended for ſo many acts of violence and oppreſſion, the effects of malice even in judges; and much more ſo in the party offended, where the puniſhment is inflicted by him.

The purpoſes of Nature are never left imperfect. Correſponding to the dread of puniſhment, is, firſt, the indignation we have at groſs crimes, even when we ſuffer not by them; and next, reſentment in the perſon injured, even for the ſlighteſt crimes: by theſe, ample proviſion is made for inflicting the puniſhment that is dreaded. No paſſion is more keen or fierce than reſentment; which, when confined within due bounds, is authoriſed by conſcience. The delinquent is ſenſible, that he may be juſtly puniſhed; and if any perſon, preferably to others, be entitled to inflict the puniſhment, it muſt be the perſon injured.

Revenge, therefore, when provoked by injury or voluntary wrong, is a privilege that belongs to every perſon by the law of Nature; for we have no criterion of right or wrong more illuſtrious than the approbation or diſapprobation of conſcience.

conſcience. And thus, the firſt law of Nature regarding ſociety, that of abſtaining from injuring others, is enforced by the moſt efficacious ſanctions.

An author of the firſt rank for genius, as well as blood, expreſſes himſelf with great propriety on this ſubject: "There is another paſſion very "different from that of fear, and which, in a "certain degree, is equally preſervative to us, "and conducing to our ſafety. As that is ſer-"viceable in prompting us to ſhun danger, ſo "is this in fortifying us againſt it, and enabling "us to repel injury, and reſiſt violence when "offered. 'Tis by this paſſion that one creature "offering violence to another, is deterred from "the execution, whilſt he obſerves how the at-"tempt affects his fellow, and knows by the "very ſigns which accompany this riſing mo-"tion, that if the injury be carried further, it "will not paſs eaſily, or with impunity. 'Tis "this paſſion withal, which, after violence and "hoſtility executed, rouſes a creature in oppo-"ſition, and aſſiſts him in returning like hoſti-"lity and harm on the invader. For thus as "rage and deſpair increaſe, a creature grows "ſtill more terrible; and, being urged to the "greateſt extremity, finds a degree of ſtrength "and boldneſs unexperienced till then, and "which had never riſen except through the "height of provocation *."

But

* Characteriſtics, vol. 2. p. 141.

But a curſory view of this paſſion is not ſufficient. It will be ſeen by and by, that the criminal law in all nations is entirely founded upon it; and for that reaſon it ought to be examined with the utmoſt accuracy. Reſentment is raiſed in different degrees, according to the ſenſe one hath of the injury. An injury done to a man himſelf, provokes reſentment in its higheſt degree. An injury of the ſame kind done to a friend or relation, raiſes reſentment in a lower degree; and the paſſion becomes gradually fainter, in proportion to the ſlightneſs of the connection. This difference is not the reſult of any peculiarity in the nature of the paſſion: it is occaſioned by what is inherent in all ſenſible beings, that every one has the ſtrongeſt ſenſe of what touches itſelf. Thus a man hath a more lively ſenſe of a kindneſs done to himſelf, than to his friend; and the paſſion of gratitude is in proportion. In the ſame manner, an injury done to myſelf, to my child, to my friend, makes a greater figure in my mind, than when done to others in whom I am leſs intereſted.

Every heinous tranſgreſſion of the law of Nature raiſeth indignation in all, and a keen deſire to have the criminal brought to condign puniſhment. Slighter tranſgreſſions are leſs regarded. A ſlight injury done to a ſtranger, with whom we have no connection, raiſeth our indignation, it is true, but ſo faintly as not to prompt any revenge.

revenge. The paſſion in this caſe, being quieſcent, vaniſheth in a moment. But a man's reſentment for an injury done to himſelf, or to one with whom he is connected, is an active paſſion, which is gratified by puniſhing the delinquent, in a meaſure correſponding to the injury. And many circumſtances muſt concur before the paſſion be completely gratified. It is not completely gratified with the ſuffering of the criminal: The perſon injured muſt inflict the puniſhment, or at leaſt direct it; and the criminal muſt be made ſenſible, not only that he is puniſhed for his crime, but that the puniſhment proceeds from the perſon injured. When all theſe circumſtances concur, and not otherwiſe, the paſſion is completely gratified; and commonly vaniſheth as if it had never been. Racine underſtood the nature of this paſſion, and paints it with great accuracy in the following ſcene.

CLEONE.

Vous vous perdez, Madame. Et vous devez ſonger—

HERMIONE.

Que je me perde, ou non, je ſonge à me venger.
Je ne ſai même encor, quoi qu'il m'ait pu promettre,
Sur d'autres que ſur moi, ſi je dois m'en remettre.
Pyrrhus n'eſt pas coupable à ſes yeux comme aux miens,
Et je tiendrois mes coups bien plus sûrs que les ſiens.

Quel plaiſir, de venger moi-même mon injure;
De retirer mon bras teint du ſang du parjure;
Et pour rendre ſa peine et mes plaiſirs plus grands,
De cacher ma rivale à ſes regards mourans!
Ah! ſi du-moins Oreſte, en puniſſant ſon crime,
Lui laiſſoit le regret de mourir ma victime!
Va le trouver. Dis-lui qu'il aprenne à l'ingrat,
Qu'on l'immole à ma haine, et non pas à l'état.
Chére Cléone, cours. Ma vengeance eſt perdue,
S'il ignore, en mourant, que c'eſt moi qui le tue.

ANDROMAQUE, act. 4. ſc. 4.

Injury, or voluntary wrong, is commonly the cauſe of reſentment; we are taught, however, by experience, that ſudden pain is ſufficient ſometimes to raiſe this paſſion, even where injury is not intended. If a man wound me by accident in a tender part, the ſudden anguiſh, giving no time for reflection, provokes reſentment, which is as ſuddenly exerted upon the involuntary cauſe. Treading upon a gouty toe, or breaking a favourite vaſe, may upon a warm temper produce this effect. The mind engroſſed by bodily pain, or any pain which raiſes bad humour, demands an object for its reſentment; and what object ſo ready as the perſon who was the occaſion of the pain? that it was undeſigned is never thought of. In the ſame manner, even a ſtock or a ſtone becomes ſometimes the object of reſentment. Striking my foot by accident againſt a ſtone, a ſmart pain enſues;

ſues: Reſentment, ſuddenly enflamed, prompts me to bray the ſtone to pieces. The paſſion is ſtill more irregular in a loſing gameſter, when he vents it on the cards and dice. All than can be ſaid as an apology for ſuch abſurd fits of paſſion, is, that they are but momentary, and vaniſh upon the firſt reflection. And yet ſuch indulgence was by the Athenians given to this irrational emotion, that if a man was killed by the fall of a ſtone, or other accident, the inſtrument of death was deſtroyed*. (1) Reſentment raiſed by

(1) The *Actio Noxalis* among the Romans, founded alſo upon the privilege of reſentment, appears not altogether void of reaſon. Animals, it was thought, were not to be exempted from puniſhment more than men; and when a domeſtic animal did miſchief contrary to its nature, the law required, that it ſhould be given up to the perſon who was hurt, in order to be puniſhed. To make this law effectual, the *Actio Noxalis* was given, which followed the animal, though even in the hands of a purchaſer *bona fide*.—§ 5. *Inſt. de Noxal. Action.*——So far it was well judged, that property ſhould yield to the more eſſential right of ſelf-preſervation, and to the privilege of puniſhing injuries. It is probable, that originally there was a neceſſity to deliver the animal to puniſhment, without admitting any alternative. But afterward, when paſſions were more under ſubjection, and the connection of property became more vigorous, which laſt will be the ſubject of a following diſcourſe, an alternative was indulged to the defendant to repair the damage, if he choſe to be at that expence, rather than ſurrender his animal.

* Meurſius de leg. Atticis, l. 1. cap. 17.

by voluntary wrong, which is a rational and uſeful paſſion, is in a very different condition. It ſubſiſts till the ſenſe of the injury be done away, by puniſhment, atonement, or length of time.

But all the irregularities of this paſſion are not yet exhauſted. It is ſtill more ſavage and irrational, when, without diſtinguiſhing the innocent from the guilty, it is exerted againſt the relations of the criminal, and even againſt the brute creatures that belong to him. Such barbarity will

animal.—*l.* 1. *pr. D. Si quadrupes pauperiem feciſſe dicatur.* ——Among modern nations, in Scotland at leaſt, this action went into diſuſe with the privilege of private puniſhment. As at preſent it belongs to the magiſtrate only to inflict puniſhment, the miſchief done by irrational animals is not regarded, but for preventing the like miſchief in time coming. The ſatisfaction of private revenge is quite diſregarded.

Ulpian ſeems not to have underſtood the nature or foundation of the *Actio noxalis*, in teaching the following doctrine, That the proprietor is primarily liable to repair the miſchief done by his animal, and that the alternative of delivering up the animal, was afterward indulged by the law of the Twelve Tables.—*l.* 6. § 1. *De re judicata.* ——The law of Nature ſubjects no man to repair the miſchief done by his horſe or his ox, if not antecedently known to be vicious. All that can be incumbent upon him, by any rational principle, is, to deliver up the animal to be puniſhed; and hence it is evident, that the privilege indulged by law, was not that of giving up the animal, but that of retaining it upon repairing the damage.

will ſcarce find credit with thoſe who have no knowledge of man but what is diſcovered by experience in a civilized ſociety; and yet, in the hiſtory and laws of ancient nations, we find this ſavage practice, not only indulged without redreſs, but, what is ſtill more aſtoniſhing, we find it authoriſed by poſitive laws. Thus, by an Athenian law, a man committing ſacrilege, or betraying his country, was baniſhed, with all his children *; and when a tyrant was killed, his children were alſo put to death †. By the law of Macedon (2), the puniſhment of treaſon was extended againſt the relations of the criminal ‡. By a Scythian law, when a criminal was puniſhed with death, all his ſons were put to death with him: His daughters only were ſaved from deſtruction §. In the laws of the Bavarians ‖, the uſe of women was forbidden to clergymen, "leſt (as in the text) the people be deſtroyed "for the crime of their paſtor:" A very groſs notion of divine puniſhment. And yet the Grecians

(2) Hanno, one of the moſt conſiderable citizens of Carthage, formed a deſign to make himſelf tyrant of his country, by poiſoning the whole ſenate at a banquet. The plot being diſcovered, he was put to death by torture, and his children, with all his relations, were at the ſame time cut off without mercy, though they had no ſhare in his guilt.—*Juſtin, l.* 21. *cap.* 4.

* Meurſius, l. 2. cap. 2. † Meurſius, l. 2. cap. 15.
‡ Quintus Curtius, l. 6. cap. 11. § Herodotus, l. 4.
‖ Tit. 1. § 13.

cians entertained the ſame notion; as appears from the Iliad, in the beginning:

Latona's ſon a dire contagion ſpread,
And heap'd the camp with mountains of the dead,
The King of men his rev'rend prieſt defy'd,
And for the King's offence the people died.

Lucan, for a crime committed by the King, thought it not unjuſt to deſtroy all Egypt *. But it may appear ſtill more ſurpriſing, that this ſavage and abſurd practice continued very long in ſome parts of the Roman empire, though governed by laws remarkable for their equity. Of this the following ſtatute of the Emperors Arcadius and Honorius † is clear evidence. "Sancimus "ibi eſſe pœnam ubi et noxia eſt. Propinquos, "notos, familiares, procul a calumnia ſubmove-"mus, quos reos ſceleris ſocietas non facit. Nec "enim adfinitas vel amicitia nefarium crimen "admittunt. Peccata igitur ſuos teneant aucto-"res: Nec ulterius progrediatur metus quam "reperiatur delictum. *Hoc ſingulis quibuſque* "*judicibus intimetur.*" At the ſame time, theſe very Emperors, however mild and rational with regard to others, talk a very different language upon a crime which affected themſelves: After obſerving, that will and purpoſe alone, without any ouvert act, is treaſon, ſubjecting the guilty perſon to a capital puniſhment and forfeiture of goods,

* L. 9. l. 145. † L. 22. C. De poenis.

goods, they go on in the following words. "Fi-
"lii vero ejus, quibus vitam Imperatoria ſpecia-
"liter lenitate concedimus, (paterno enim debe-
"rent perire ſupplicio, in quibus paterni, hoc eſt
"hereditarii, criminis exempla metuuntur), a
"materna, vel avita, omnium etiam proximorum
"hereditate ac ſucceſſione habeantur alieni: Te-
"ſtamentis extraneorum nihil capiant: Sint per-
"petuo egentes, et pauperes, infamia eos paterna
"ſemper comitetur, ad nullos prorſus honores,
"ad nulla ſacramenta perveniant: Sint poſtre-
"mo tales, ut his, perpetua egeſtate fordentibus,
"ſit et mors ſolatium, et vita ſupplicium *."
Every one knows, that murder committed by a member of any tribe or clan, was reſented, not only againſt the criminal and his relations, but againſt the whole tribe or clan: A ſpecies of reſentment ſo common as to be diſtinguiſhed by a peculiar name, that of *deadly feud*. So late as the days of King Edmond, a law was made in England, forbidding deadly feud, except betwixt the relations of the deceaſed and the murderer himſelf; and declaring, that theſe relations ſhall forfeit all their goods, if they proſecute with deadly feud the relations of the murderer. In Japan, to this day, it is the practice to involve children and relations in the puniſhment of capital crimes †.

A

* L. 5. § 1. C. Ad leg. Jul. Majeſt.

† See Kemfer's Hiſtory of Japan.

A tendency to exceſs, ſo deſtructive in the paſſion of reſentment, is often in other paſſions the occaſion of good. Joy, when exceſſive, as well as gratitude, are not confined to their proper objects, but expand themſelves upon whatever is connected with theſe objects. In general, all our active paſſions, in their naſcent ſtate and when moderate, are accompanied with a ſenſe of fitneſs and rectitude; but when exceſſive, they enflame the mind, and violently hurry it to action, without due diſtinction of objects.

And this leads to a reflection upon the irregular tendency of reſentment here diſplayed. If it be the nature of all active paſſions, when immoderate, to expand themſelves beyond their proper objects, which is remarkable in friendſhip, love, gratitude, and all the ſocial paſſions, it ought not to be ſurpriſing, that reſentment, hatred, envy, and other diſſocial paſſions, ſhould not be more regular. Among ſavages, this tendency may perhaps have a bad effect, by adding force to the malevolent paſſions: But in a civilized ſtate, where diſſocial paſſions are ſoftened, if not ſubdued, this tendency is, upon the whole, extremely beneficial.

It is obſerved above, that revenge is a privilege beſtowed by the law of Nature on thoſe who ſuffer by a voluntary injury; and the correſpondence hath alſo been obſerved betwixt this privilege and the ſenſe of merited puniſhment, which makes

makes the criminal ſubmit to the puniſhment he deſerves. Thus by the law of Nature, the perſon injured acquires a right over the delinquent, to chaſtiſe and puniſh him in proportion to the injury; and the delinquent, ſenſible of the right, knows he ought to ſubmit to it. Hence puniſhment is commonly ſaid to be a ſort of debt, which the criminal is bound to pay to the perſon he hath injured (3); and this way of ſpeaking may ſafely be indulged as an analogical illuſtration, provided no conſequence be drawn that the analogy will not juſtify. This caution is not unneceſſary; for many writers, influenced by the foregoing ſemblance, reaſon about puniſhment unwarily, as if it were a debt in the ſtricteſt ſenſe. By means of the ſame reſemblance, a notion prevailed in the darker ages of the world, of a ſubſtitute in puniſhment, who undertakes the debt and ſuffers the puniſhment that another merits. Traces of this opinion are found in the religious ceremonies of the ancient Egyptians and other ancient nations. Among them the conceptions of a Deity were groſs, and of morality no leſs ſo. We muſt not therefore be ſurpriſed at their notion of a transference of puniſhment, as of debt, from one perſon to another. They were impoſed upon by the flight analogy above-mentioned; which reaſoning taught them

(3) Upon this reſemblance, the expreſſion in the Roman language, *ſolvere* or *pendere poenas*, is founded.

them not to correct, becauſe reaſoning at that time was in its infancy. The prevalence of this notion in the religious ceremonies of the ancient Egyptians, is vouched by Herodotus *. A bull is choſen pure white, for a ſacrifice to their god Apis. The victim is brought to the altar, a fire kindled, wine poured out, and prayers pronounced. The bull is killed; and his head is thrown into the river, with the following execration: "May all the evils impending over thoſe who "perform this ſacrifice, or over the Egyptians in "general, be averted on this head." Even in later times, when a Roman army was in hazard of a defeat, it was not uncommon for the general to devote himſelf to death, in order to obtain the victory †. Is not this practice founded upon the ſame notion? Let Lucan anſwer the queſtion.

O utinam, coelique Deis, Erebique liberet
Hoc caput in cunctas damnatum exponere poenas!
Devotum hoſtiles Decium preſſere catervae:
Me geminae figant acies, me barbara telis
Rheni turba petat: cunctis ego pervius haſtis
Excipiam medius totius vulnera belli.
Hic redimat ſanguis populos: hac caede luatur
Quicquid Romani meruerunt pendere mores.

L. 2. l. 306.

And

* Book 2.

† Tit. Liv. l. 8. § 9.; and again, l. 10. § 28. 29.

And the following paſſage of Horace, ſeems to be founded on the ſame notion.

At tu, nauta, vagae ne parce malignus arenae
Oſſibus et capiti inhumato
Particulam dare. Sic, quodcunque minabitur Eurus
Fluctibus Heſperiis, Venuſinae
Plectantur ſylvae, te ſoſpite.

CARM. l. 1. ode 28.

That one ſhould undertake a debt for another, is a matter of conſent, not repugnant to the rules of juſtice. But with reſpect to the adminiſtration of juſtice among men, no maxim has a more ſolid foundation or is more univerſal, than that puniſhment cannot be transferred from the guilty to the innocent. Puniſhment, conſidered as a gratification of the party offended, is purely perſonal; and, being inſeparately connected with guilt, cannot admit of ſubſtitution. A man may conſent, it is true, to ſuffer that pain which his friend the offender merits as a puniſhment; but the injured perſon is not ſatisfied with ſuch tranſmutation of ſuffering: his reſentment is not gratified but by retaliating upon the very perſon who did the injury. Yet, even in a matter obvious to reaſon, ſo liable are men to error when led aſtray by any bias, that to the foregoing notion concerning puniſhment, we may impute the moſt barbarous practice ever prevailed among ſavages, that of ſubſtituting human crea-

tures in puniſhment, and compelling them to undergo the moſt grievous torments, even death itſelf. I ſpeak of human ſacrifices, which are deſervedly a laſting reproach upon mankind, being of all human inſtitutions the moſt irrational, and the moſt ſubverſive of humanity. To ſacrifice a priſoner of war to an incenſed deity, barbarous and inhuman as it is, may admit ſome excuſe. But that a man ſhould ſacrifice his children as an atonement for his crimes, cannot be thought of without horror (4). Yet this ſavage impiety can reſt upon no other foundation than the ſlight reſemblance that puniſhment hath to a debt; which is a ſtrong evidence of the influence of imagination upon our conduct. The vitious hath ever been ſolicitous to transfer upon others the puniſhment they themſelves deſerve; for nothing is ſo dear to a man as himſelf. "Wherewith ſhall I come before the "Lord, and bow myſelf before the high God? "ſhall

(4) When Agathocles King of Syracuſe, after a compleat victory laid ſiege to Carthage, the Carthaginians, believing that their calamities were brought upon them by the anger of the gods, became extremely ſuperſtitious. It had been the cuſtom to ſacrifice to their god Saturn, the ſons of the moſt eminent perſons; but the later practice was, to purchaſe and breed up children for that purpoſe. That they might therefore without delay reform what was amiſs, they offered, as a public ſacrifice, two hundred of the ſons of the nobility.

Diodorus Siculus, book 20. ch. 1.

" ſhall I come before him with burnt-offerings,
" with calves of a year old? Will the Lord be
" pleaſed with thouſands of rams, or with ten
" thouſand rivers of oil? ſhall I give my firſt-
" born for my tranſgreſſion, the fruit of my body
" for the ſin of my ſoul?" But this is not an atonement in the ſight of the Almighty. " He
" hath ſhewed thee, O man, what is good; and
" what doth the Lord require of thee, but to do
" juſtly, and to love mercy, and to walk hum-
" bly with thy God *?"

I beg indulgence for a reflection that ariſes naturally from this branch of the ſubject; that the permitting vicarious puniſhment is ſubverſive of humanity, and no leſs ſo of moral duty. Encourage a man to believe that without repentance or reformation of manners he can atone for his ſins, and he will indulge in them for ever. Happy it is for mankind, that by the improvement of our rational faculties, the open profeſſion of compounding for ſin is baniſhed from all civilized ſocieties: And yet from the ſelfiſhneſs of human nature this doctrine continues privately to influence our conduct more than is willingly acknowledged, or even ſuſpected. Many men give punctual attendance at public worſhip, to compound for hidden vices; many are openly charitable, to compound for private oppreſſion; and many are willing to do God good ſervice in

* Micah vi.

ſupporting his eſtabliſhed church, to compound for aiming at power by a factious diſturbance of the ſtate. Such pernicious notions, proceeding from a wrong bias in our nature, cannot be eradicated after they have once got poſſeſſion; nor be prevented, but by early culture, and by frequently inculcating the moſt important of all truths, That the Almighty admits of no compoſition for ſin; and that his pardon is not to be obtained, without ſincere repentance, and thorough reformation of manners.

Having diſcourſed in general of the nature of puniſhment, and of ſome irregular notions that have been entertained about it, I am now ready to attend its progreſs through the different ſtages of the ſocial life. Society, originally, did not make a ſtrict union among individuals. Mutual defence againſt a more powerful neighbour, being in early times the chief or ſole motive for joining in ſociety, individuals never thought of ſurrendering to the public, any of their natural rights that could be retained conſiſtently with mutual defence. In particular, the privileges of maintaining their own property and of avenging their own wrongs, were reſerved to individuals full and entire. In the dawn of ſociety accordingly, we find no traces of a judge, properly ſo called, who hath power to interpoſe in differences, and to force perſons at variance to ſubmit to his opinion. If a diſpute about property, or about any

any civil right, could not be adjuſted by the parties themſelves, there was no other method, but to take the opinion of ſome indifferent perſon. This method of determining civil differences was imperfect; for what if the parties did not agree upon an arbiter? Or what if one of them proved refractory, after the choſen arbiter had given his opinion? To remedy theſe inconveniencies, it was found expedient to eſtabliſh judges, who at firſt differed in one circumſtance only from arbiters, that they could not be declined. They had no magiſterial authority, not even that of compelling parties to appear before them. This is evident from the Roman law, which ſubſiſted many centuries before the notion obtained of a power in a judge to force a party into court. To bring a diſputable matter to an iſſue, no other means occurred, but the making it lawful for the complainer to drag his party before the judge *obtorto collo*, as expreſſed by the writers on that law: And the ſame regulation appears in the laws of the Viſigoths *. But juriſdiction, at firſt merely voluntary, came gradually to be improved to its preſent ſtate of being compulſory, involving ſo much of the magiſterial authority as is neceſſary for explicating juriſdiction, viz. power of calling a party into court, and power of making a ſentence effectual. And in this

 manner,

* L. 6. tit. 4. § 4.

ſupporting his eſtabliſhed church, to compound for aiming at power by a factious diſturbance of the ſtate. Such pernicious notions, proceeding from a wrong bias in our nature, cannot be eradicated after they have once got poſſeſſion; nor be prevented, but by early culture, and by frequently inculcating the moſt important of all truths, That the Almighty admits of no compoſition for ſin; and that his pardon is not to be obtained, without ſincere repentance, and thorough reformation of manners.

Having diſcourſed in general of the nature of puniſhment, and of ſome irregular notions that have been entertained about it, I am now ready to attend its progreſs through the different ſtages of the ſocial life. Society, originally, did not make a ſtrict union among individuals. Mutual defence againſt a more powerful neighbour, being in early times the chief or ſole motive for joining in ſociety, individuals never thought of ſurrendering to the public, any of their natural rights that could be retained conſiſtently with mutual defence. In particular, the privileges of maintaining their own property and of avenging their own wrongs, were reſerved to individuals full and entire. In the dawn of ſociety accordingly, we find no traces of a judge, properly ſo called, who hath power to interpoſe in differences, and to force perſons at variance to ſubmit to his opinion. If a diſpute about property, or about

any

any civil right, could not be adjuſted by the parties themſelves, there was no other method, but to take the opinion of ſome indifferent perſon. This method of determining civil differences was imperfect; for what if the parties did not agree upon an arbiter? Or what if one of them proved refractory, after the choſen arbiter had given his opinion? To remedy theſe inconveniencies, it was found expedient to eſtabliſh judges, who at firſt differed in one circumſtance only from arbiters, that they could not be declined. They had no magiſterial authority, not even that of compelling parties to appear before them. This is evident from the Roman law, which ſubſiſted many centuries before the notion obtained of a power in a judge to force a party into court. To bring a diſputable matter to an iſſue, no other means occurred, but the making it lawful for the complainer to drag his party before the judge *obtorto collo*, as expreſſed by the writers on that law: And the ſame regulation appears in the laws of the Viſigoths *. But juriſdiction, at firſt merely voluntary, came gradually to be improved to its preſent ſtate of being compulſory, involving ſo much of the magiſterial authority as is neceſſary for explicating juriſdiction, viz. power of calling a party into court, and power of making a ſentence effectual. And in this manner,

* L. 6. tit. 4. § 4.

manner, civil juriſdiction in progreſs of time was brought to perfection.

Criminal juriſdiction is in all countries of a much later date. Revenge, the darling privilege of undiſciplined nature, is never tamely given up; for the reaſon chiefly, that it is not gratified unleſs the puniſhment be inflicted by the perſon injured. The privilege of reſenting injuries, was therefore that private right which was the lateſt of being ſurrendered, or rather wreſted from individuals in ſociety. This revolution was of great importance with reſpect to government, which can never fully attain its end, where puniſhment in any meaſure is truſted in private hands. A revolution ſo coutradictory to the ſtrongeſt propenſity of human nature, could not by any power, nor by any artifice, be inſtantaneous. It muſt have been gradual; and, in fact, the progreſſive ſteps tending to its completion, were ſlow, and, taken ſingly, almoſt imperceptible; as will appear from the following hiſtory. And to be convinced of the difficulty of wreſting this privilege from individuals, we need but reflect upon the practice of duelling, ſo cuſtomary in times paſt; which the ſtricteſt attention in the magiſtrate, joined with the ſevereſt puniſhment, have not altogether been able to repreſs.

No production of art or nature is more imperfect than is government in its infancy, comprehending

prehending no ſort of juriſdiction, civil or criminal. What can more tend to break the peace of ſociety, and to promote univerſal diſcord, than that every man ſhould be the judge in his own cauſe, and inflict puniſhment according to his own judgment? But inſtead of wondering at the original weakneſs of government, our wonder would be better directed upon its preſent ſtate of perfection, and upon the means by which it hath arrived to that ſtate, in oppoſition to the ſtrongeſt and moſt active principles of human nature. This ſubject makes a great figure in the hiſtory of man; and that it partly comes under the preſent undertaking, I eſteem a lucky circumſtance.

A partiality rooted in the nature of man, makes private revenge a moſt dangerous privilege. The man who is injured, having a ſtrong ſenſe of the wrong done him, never dreams of putting bounds to his reſentment. The offender, on the other hand, under-rating the injury, judges a ſlight atonement ſufficient. Further, the man who ſuffers is apt to judge raſhly, and to blame perſons without cauſe. To reſtrain the unjuſt effects of natural partiality, was not an eaſy taſk; and probably was not ſoon attempted. But early meaſures were taken to prevent the bad effects of raſh judgment, by which the innocent were often oppreſſed. We have one early inſtance among the Jews: Their

cities of refuge were appointed as an interim ſanctuary to the man-ſlayer, till the elders of the city had an opportunity to judge whether the deed was voluntary or caſual. If caſual, the man was protected from the reſentment of the party offended, called in the text *the avenger of blood*: but he was to remain in that city until the death of the high prieſt, to give time for reſentment to ſubſide. If the man taking benefit of the ſanctuary was found guilty, he was delivered to the avenger of blood that he might die *. In the laws of the Athenians, and alſo of the barbarous nations who diſmembered the Roman empire, we find regulations that correſpond to this among the Jews; and which, in a different form, prevented erroneous judgment ſtill more effectually than was done by the cities of refuge. If a crime was manifeſt, the party injured might avenge himſelf without any ceremony. Therefore it was lawful for a man to kill his wife and the adulterer found together †. It was lawful for a man to kill his daughter taken in the act of fornication. The ſame was lawful to the brothers and uncles after the father's death ‡. And it was lawful to kill a thief apprehended under night with ſtolen goods ‖. But

* Numbers xxxv. Deut. xix.

† Meurſius de leg. Atticis, l. 1. c. 4.; Laws of the Viſigoths, l. 3. tit. 4. § 4.; Laws of the Bavar. tit. 7. § 1.

‡ Laws of the Viſig. l. 3. tit. 4. § 5.

‖ Laws of the Bavar. tit. 8. § 5.

But if the crime was not manifeſt, a previous trial was required, in order to determine whether the ſuſpected perſon was guilty or innocent. Thus a married woman ſuſpected of adultery, muſt be accuſed before the judge; and, if found guilty, ſhe and the adulterer are delivered over to the huſband to be puniſhed at his will *. If a free woman live in adultery with a married man, ſhe is delivered by the judges to the man's wife to be puniſhed at her will †. He that ſteals a child, ſhall be delivered to the child's relations to be put to death, or ſold, at their pleaſure ‡. A ſlave who commits fornication with a free woman, muſt be delivered to her parents to be put to death ‖.

In tracing the hiſtory of law through dark ages, unprovided with records, or ſo ſlenderly provided as not to afford any regular hiſtorical chain, we muſt endeavour to ſupply the broken links, by hints from poets and hiſtorians, by collateral facts, and by cautious conjectures drawn from the nature of the government, of the people, and of the times. If we uſe all the light that is afforded, and if the conjectural facts correſpond with the few facts that are diſtinctly vouched, and join all in one regular chain, more cannot

* Laws of the Viſig. l. 3. tit. 4. § 3.
† Ibid. l. 3. tit. 4. § 9.
‡ Ibid. l. 7. tit. 3. § 3.
‖ Laws of the Bavar. tit. 7. § 9.

cannot be expected from human endeavours. Evidence muſt afford conviction, if it be the beſt of the kind. This apology is neceſſary with regard to the ſubject under conſideration. In tracing the hiſtory of the criminal law, we muſt not hope that all its ſteps and changes can be drawn from the archives of any one nation. In fact, many ſteps were taken and many changes made, before archives were kept, and even before writing was a common art. We muſt be ſatisfied with collecting the facts and circumſtances as they may be gathered from the laws of different countries: and if theſe put together make a regular chain of cauſes and effects, we may rationally conclude, that the progreſs has been the ſame among all nations, in the capital circumſtances at leaſt; for accidents, or the ſingular nature of a people, or of a government, will always produce ſome peculiarities.

Emboldened by this apology, I proceed chearfully in the taſk I have undertaken. The neceſſity of applying to a judge, where any doubt aroſe about the author of the crime, was probably, in all countries, the firſt inſtance of the legiſlature's interpoſing in puniſhment. It was a novelty; but it was ſuch as could not readily alarm individuals, being calculated not to reſtrain the privilege of revenge, but only to direct revenge to its proper object. The application to a judge was made neceſſary among the Jews, by the

the privilege conferred upon the cities of refuge; and, among other nations, by a poſitive law without any circuit. That this was the law of the Viſigoths and Bavarians, hath already been ſaid; and that it was alſo the law of Abyſſinia and Athens, will appear below. The ſtep next in order, was an improvement upon this regulation. The neceſſity of applying to a judge, removed all ambiguity about the criminal, but it did not remove an evil repugnant to humanity and juſtice, that of putting the offender under the power of the party injured, to be puniſhed at his pleaſure. With relation to this point, I diſcover a wiſe regulation in Abyſſinia. In that empire, the degree or extent of puniſhment, is not left to the diſcretion of the perſon injured. The governor of the province names a judge, who determines what puniſhment the crime deſerves. If death, the criminal is delivered to the accuſer, who has thereby an opportunity to gratify his reſentment to the full *. This regulation muſt be approved, becauſe it reſtrains in a conſiderable degree exceſs in revenge. But a great latitude ſtill remaining in the manner of executing the puniſhment, this alſo was rectified by a law among the Athenians. A perſon ſuſpected of murder was firſt carried before the judge; and, if found guilty, was delivered to the relations of the deceaſed, to be put to death if they thought proper.

* Father Lobo's voyage to Abyſſinia, ch. 3.

per. But it was unlawful for them to put him to any torture, or to force money from him *. Whether the regulations now mentioned, were peculiar to Athens and Abyſſinia, I cannot ſay; for I have not diſcovered any traces of them in the cuſtoms of other nations. They were remedies ſo proper for the diſeaſe, that one ſhould imagine they muſt have obtained every where ſome time or other. Perhaps they have been prevented, and rendered unneceſſary, by a cuſtom I am now to enter upon, which made a great figure in Europe for many ages, that of pecuniary compoſitions for crimes.

Of theſe pecuniary compoſitions, I diſcover traces among many nations. It is natural to offer ſatisfaction to the party injured; and no ſatisfaction is for either party more commodious, than a ſum of money. Avarice, it is true, is not ſo fierce a paſſion as reſentment; but it is more ſtable, and by its perſeverance often prevails over the keeneſt paſſions. With regard to man-ſlaughter in particular, which doth not always diſtreſs the neareſt relations, it may appear prudent to relinquiſh the momentary pleaſure of gratifying a paſſion for a permanent good. At the ſame time, the notion that puniſhment is a kind of debt, did certainly facilitate the introduction of this cuſtom; and there was opportunity for its becoming univerſal, during the period

* Meurſius de leg. Atticis, l. 1. cap. 20.

period that the right of puniſhment was in private hands. We find traces of this cuſtom among the ancient Greeks. The huſband had a choice to put the adulterer to death, or to exact a ſum from him *. And Homer plainly alludes to this law, in his ſtory of Mars and Venus entangled by the huſband Vulcan in a net, and expoſed to public view:

Loud laugh the reſt, ev'n Neptune laughs aloud,
Yet ſues importunate to looſe the god:
And free, he cries, oh Vulcan! free from ſhame
Thy captives, I enſure the penal claim.
Will Neptune (Vulcan then) the faithleſs truſt?
He ſuffers who gives ſurety for th' unjuſt:
But ſay, if that leud ſcandal of the ſky
To liberty reſtor'd, perfidious, fly,
Say, wilt thou bear the mulct? He inſtant cries,
The mulct I bear, if Mars perfidious flies.

ODYSS. viii. l. 381.

The Greeks alſo admitted a compoſition for murder; as appears from the following paſſage:

Stern and unpitying! if a brother bleed,
On juſt atonement, we remit the deed;
A ſire the ſlaughter of his ſon forgives,
The price of blood diſcharg'd, the murd'rer lives;
The haughtieſt hearts at length their rage reſign,
And gifts can conquer ev'ry ſoul but thine.
The gods that unrelenting breaſt have ſteel'd,
And curs'd thee with a mind that cannot yield.

ILIAD, ix. l. 743.

Again,

* Meurſius de leg. Atticis, l. 1. cap. 4.

Again,

There in the forum, ſwarm a num'rous train;
The ſubject of debate, a town's-man ſlain:
One pleads the fine diſcharg'd, which one deny'd;
And bade the public and the laws decide.

ILIAD xviii. l. 577.

One of the laws of the Twelve Tables was, Si membrum rupit, ni cum eo pacit, talio eſto *. And Tacitus is very expreſs upon this cuſtom among the Germans †: "Suſcipere tam inimicitias ſeu patris ſeu propinqui quam amicitias neceſſe eſt: nec implacabiles durant; luitur enim etiam homicidium certo armentorum ac pecorum numero, recipitque ſatisfactionem univerſa domus." We find traces of the ſame thing in Abyſſinia ‡, among the negroes on the coaſt of Guinea ||, and among the blacks of Madagaſcar **. The laws of the barbarous nations cited above, inſiſt longer upon theſe compoſitions than upon any other ſubject; and that the practice was eſtabliſhed among our Saxon anceſtors, under the name of *Vergelt*, is known to all the world.

This practice at firſt, as may reaſonably be conjectured, reſted entirely upon private conſent. It

* Aulus Gellius, l. 20. cap. 1.
† De moribus Germanorum. ‡ Lobo, chap. 7.
|| Deſcription of the coaſt of Guinea, letters 10. and 11. ** Drury, p. 240.

It was ſo in Greece, if we can truſt Euſtathius in his notes on the foregoing paſſage in the Iliad firſt quoted. He reports, that the murderer was obliged to go into baniſhment one year, unleſs he could purchaſe liberty to remain at home, by paying a certain fine to the relations of the deceaſed. While compoſitions for crimes reſted upon this foundation, there was nothing new or ſingular in them. The perſon injured might puniſh or forgive at his pleaſure; and might remit the puniſhment upon terms or conditions. But the practice, if not remarkable in its naſcent ſtate, made a great figure in its progreſs. It was not only countenanced, but greatly encouraged, among all nations, as the likelieſt means to reſtrain the impetuoſity of revenge: till becoming frequent and cuſtomary, it was made law; and what at firſt was voluntary, became in proceſs of time neceſſary. But this change was ſlow and gradual. The firſt ſtep probably was to interpoſe in behalf of the delinquent, if he offered a reaſonable ſatisfaction in cattle or money, and to afford him protection if the ſatisfaction was refuſed by the perſon injured. The next ſtep was to make it unlawful to proſecute reſentment, without firſt demanding ſatisfaction from the delinquent. And in the laws of King Ina * we read, that he who takes revenge without firſt demanding ſatisfaction, muſt reſtore what

* Lambard's Collection, law 9.

what he has taken, and further be liable in a compenſation. The third ſtep completed the ſyſtem, which was to compel the delinquent to pay, and the perſon injured to accept, a proper ſatisfaction. By the laws of the Longobards *, if the perſon injured refuſed to accept a compoſition, he was ſent to the king to be impriſoned, in order to reſtrain him from revenge. And if the criminal refuſed to pay a compoſition, he alſo was ſent to the king to be impriſoned, in order to reſtrain him from doing more miſchief. After compoſition is made for manſlaughter, the perſon injured muſt give his oath not further to proſecute his feud †; and if he notwithſtanding follow out his revenge, he is ſubjected to a double compoſition ‡.

Altars, among moſt nations, were places of ſanctuary. The perſon who fled to an altar, was held to be under the immediate protection of the deity, and therefore inviolable. This practice prevailed among the Jews, as appears by the frequent mention of laying hold on the horns of the altar. Among the Grecians ‖,

> Phemius alone the hand of vengeance ſpar'd,
> Phemius the ſweet, the heav'n-inſtructed bard.

Beſide

* Laws of the Longobards, l. 1. tit. 37. § 1.
† Ibid. l. 1. tit. 9. § 34.
‡ Ibid. l. 1. tit. 9. § 8.
‖ Meurſius de leg. Atticis, l. 2. cap. 32.

Beſide the gate the rev'rend minſtrel ſtands;
The lyre, now ſilent, trembling in his hands;
Dubious to ſupplicate the chief, or fly
To Jove's inviolable altar nigh.

ODYSSEY xxii. l. 367.

Ædibus in mediis, nudoque ſub aetheris axe,
Ingens ara fuit; juxtaque veterrima laurus,
Incumbens arae, atque umbra complexa Penates.
Hic Hecuba, et natae nequicquam altaria circum
Praecipites atra ceu tempeſtate columbae
Condenſae, et Divum amplexae ſimulacra tenebant.
Ipſum autem ſumptis Priamum juvenilibus armis
Ut vidit: Quae mens tam dira, miſerrima conjux,
Impulit his cingi telis? aut quo ruis? inquit.
Non tali auxilio, nec defenſoribus iſtis
Tempus eget: Non, ſi ipſe meus nunc afforet Hector,
Huc tandem concede: Haec ara tuebitur omnes,
Aut moriere ſimul. Sic ore effata, recepit
Ad ſeſe, et ſacra longaevum in ſede locavit.

ÆNEID, l. 2. l. 512.

Altars prevailed alſo among Chriſtians. Thus by the law of the Viſigoths *, if a murderer fly to the altar, the prieſt ſhall deliver him to the relations of the deceaſed, upon giving oath that, in proſecuting their revenge, they will not put him to death. Had the proſecutor, at this period, been bound to accept of a compoſition, the privilege of ſanctuary would have been unneceſſary.

* L. 6. tit. 5. § 16.

By this time, however, the practice of compounding for crimes had gained ſuch authority, that it was thought hard, even for a murderer to loſe his life by the obſtinacy of the dead man's relations. But this practice gaining ſtill more authority, it was enacted in England *, That if any guilty of a capital crime fly to the church, his life ſhall be ſafe, but he muſt pay a compoſition. Thus it appears, that the privilege of ſanctuary, though the child of ſuperſtition, was extremely uſeful while the power of puniſhment was a private right: But now that this right is transferred to the public, and that there is no longer any hazard of exceſs in puniſhment, a ſanctuary for crimes, which hath no other effect but to reſtrain the free courſe of the criminal law and to give unjuſt hopes of impunity, ought not to be tolerated in any ſociety.

When compoſitions firſt came in uſe, it is probable that they were authoriſed in ſlight delinquencies only. We read in the laws of the Viſigoths †, That if a free man ſtrike another free man on the head, he ſhall pay for diſcolouring the ſkin, five ſhillings; for breaking the ſkin, ten ſhillings; for a cut which reaches the bone, twenty ſhillings; and for a broken bone, one hundred ſhillings: But that greater crimes ſhall be more ſeverely puniſhed; maiming, diſmembering,

* Laws of King Ina, collected by Lambard, law 5.

† L. 6. tit. 4. § 1.

ing, or depriving one of his natural liberty by impriſonment or fetters, to be puniſhed by the *lex talionis* *. But compoſitions growing more and more reputable, were extended to the groſſeſt delinquencies. The laws of the Burgundians, of the Salians, of the Almanni, of the Bavarians, of the Ripuarii, of the Saxons, of the Angli and Thuringi, of the Friſians, of the Longobards, and of the Anglo-Saxons, are full of theſe compoſitions, extending from the moſt trifling injury, to the moſt atrocious crimes, not excepting high treaſon by imagining and compaſſing the death of the king. In peruſing the tables of theſe compoſitions, which enter into a minute detail of the moſt trivial offences, a queſtion naturally occurs, why all this ſcrupulous nicety of adjuſting ſums to delinquencies? Such a thing is not heard of in later times. The following anſwer will give ſatisfaction, That reſentment, allowed ſcope among barbarians, was apt to take flame by the ſlighteſt ſpark (5).

(5) In the year 1327, moſt of the great houſes in Ireland were banded one againſt another, the Giraldines, Butlers, and Breminghams, on the one ſide, and the Bourkes and Poers on the other. The ground of the quarrel was no other, but that the Lord Arnold Poer had called the Earl of Kildare, *Rimer*. This quarrel was proſecuted with ſuch malice and violence, that the counties of Waterford and Kilkenny were deſtroyed with fire and ſword. *Affairs of Ireland by Sir John Davies.*

* Laws of the Viſigoths, l. 6. tit. 4 § 3.

Therefore, to provide for its gratification, it became neceſſary to enact compoſitions for every trifling wrong, ſuch as at preſent would be the ſubject of mirth rather than of ſerious puniſhment. For example, where the cloaths of a woman bathing in a river, are taken away to expoſe her nakedneſs *; and where dirty water is thrown upon a woman as a mark of contumely †. But as the criminal law is now modelled, private reſentment being in a good meaſure ſunk in public puniſhment, nothing is reckoned criminal, but what encroaches on the ſafety or peace of ſociety; and ſuch a puniſhment is choſen, as may have the effect of repreſſing the crime in time coming, without much regarding the gratification of the party offended.

As theſe compoſitions were favoured by the reſemblance that private puniſhment has to a debt, they were apt, in a groſs way of thinking, to be conſidered as reparation to the party injured for his loſs or damage. Therefore, in adjuſting theſe compoſitions, no ſteady or regular diſtinction is made betwixt voluntary and involuntary acts. He who wounded or killed a man by chance, was liable to a compoſition ‡; and even where a man was killed in ſelf-defence, a full

* Laws of the Longobards, l. 1. tit. 12. § 6.

† Ibid. § 8.

‡ Laws of the Angli and Thuringi, § 10.; Laws of Henry I. of England, law 70.

full compoſition was due *. A diſtinction was made by a law among the Longobards, enacting, That involuntary wrongs ſhould bear a leſs compoſition than voluntary †. And the ſame rule did no doubt obtain among other nations, when they came to think more accurately about the nature of puniſhment (6). But ſuch was the prevalency of reſentment, that though at firſt no alleviation or excuſe was ſuſtained to mitigate the compoſition, aggravating circumſtances were often laid hold of to enflame it. Thus he who took the opportunity of fire or ſhipwreck to ſteal goods, was obliged to reſtore fourfold. ‡. Theſe compoſitions were alſo proportioned to the dignity of the perſons injured;

(6) What is ſaid above about the nature of reſentment, that when ſuddenly raiſed it makes no diſtinction betwixt a voluntary and involuntary wrong, may help to explain this matter. It is certain, that ſuch groſſneſs of conception was not peculiar to the barbarous nations. The polite Grecians appear to be a little ſenſible of the diſtinction as the others. Ariſtotle talks familiarly of an involuntary crime: And that this was not merely a way of ſpeaking, appears from the ſtory of Oedipus, whoſe crimes, if they can be called ſo, were, ſtrictly ſpeaking, involuntary. And by an expreſs law among the Athenians, involuntary ſlaughter was puniſhed with baniſhment, without liberty of returning till the relations of the deceaſed were ſatisfied. *Meurſius de leg. Atticis, l.* 1. *cap.* 16.

* Laws of the Longobards, l. 1. tit. 9. § 19.

† Law 1. tit. 2. § 11.

‡ Laws of the Viſigoths, l. 7. tit. 2. § 18.

and from this ſource is derived our knowledge of the different ranks and titles of honour among the barbarous nations above mentioned. And it is a ſtrong indication of their approach to humanity and politeneſs, that their compoſitions for injuries done to women are generally double.

As to the perſons entitled to the compoſition, it muſt be obvious, in the firſt place, that he only had right to the compoſition who was injured: But if a man was killed, every one of his relations was entitled to a ſhare, becauſe they were all ſufferers by his death. Thus, in the Salic laws *, where a man is killed, the half of the compoſition belongs to his children; the other half to his other relations, upon the ſide of the father and mother. If there be no relations on the father's ſide, the part that would belong to them accrues to the fiſk. The like if there be no relations on the mother's ſide. The Longobards had a ſingular way of thinking in this matter. Female relations got no part of the compoſition; and the reaſon given is, That they cannot aſſiſt in proſecuting revenge, *Non poſſunt ipſam faydam levare* †. But women are capable of receiving ſatisfaction or atonement for a crime committed againſt their relation, and therefore

* Tit. 65.

† L. 1. tit. 9. § 18.

therefore are entitled in juſtice to ſome ſhare of the compoſition (7).

Before entering upon a new branch, I muſt lay hold of the preſent opportunity, to beſtow a reflection on this ſingular practice of compounding for crimes. However ſtrange it may appear to us, it was certainly a happy invention. By the temptation of money, men were gradually accuſtomed to ſtifle their reſentment. This was a fine preparation for transferring the power of puniſhment to the magiſtrate, which would have been impracticable without ſome ſuch intermediate ſtep: for while individuals retain their privilege of avenging injuries, the paſſion of reſentment, fortified by univerſal practice, is too violent to be ſubdued by the force of any government.

We are now arrived at the laſt and moſt ſhining period of our hiſtory; which is, to unfold the means by which criminal juriſdiction, or the right of puniſhment, was transferred from private hands to the magiſtrate. There perhaps never was in government a revolution of greater importance. While criminal juriſdiction is engroſſed by every individual for his own behoof, there muſt be an overbalance of power in the people, inconſiſtent with any ſtable adminiſtra-

(7) See in the Appendix, No 1. the form of an amicable compoſition for murder, termed in our law, *Letter of Slains*.

tion of public affairs. The daily practice of blood, makes a nation fierce and wild, not to be awed by the power of any government. A government, at the ſame time, deſtitute of the power of the ſword, except in crimes againſt the public which are rare, muſt be ſo weak, as ſcarce to be a match for the tameſt people: for it cannot eſcape obſervation, that nothing tends more to ſupport the authority of the magiſtrate, than his power of criminal juriſdiction; becauſe every exerciſe of that power, being public, ſtrikes every eye. In a country already civilized, the power of making laws may be conſidered as a greater truſt: But in order to eſtabliſh the authority of government, and to create awe and ſubmiſſion in the people, the power of making laws is a mere ſhadow, without the power of the ſword.

In the original formation of ſocieties, to which mutual defence againſt ſome more powerful enemy was the chief or ſole motive, the idea of a common intereſt otherwiſe than for defence, of a public, of a community, was ſcarce underſtood. War, indeed, requiring the ſtricteſt union among individuals, introduced the notion of a number of men becoming an army, governed, like a ſingle perſon, by one mind and one council. But in peaceable times, every man relied upon his own proweſs, or that of his clan, without having any notion of a common intereſt, of which no ſigns appeared. There was, indeed,

from

from the beginning, ſome ſort of government; but it was ſo limited, that the magiſtrate did not pretend to interpoſe in private differences, whether civil or criminal. In the infancy of ſociety, the idea of a public is ſo faint and obſcure, that public crimes, where no individual is hurt, paſs unregarded. But when government hath advanced to ſome degree of maturity, the public intereſt is then recogniſed, and the nature of a crime againſt the public underſtood. This notion muſt gain ſtrength, and become univerſal in the courſe of a regular adminiſtration, ſpreading itſelf upon all affairs which have any connection with the common intereſt. It naturally comes to be conſidered, that by all atrocious crimes the public is injured, and by open rapine and violence the peace of the ſociety broke. This introduced a new regulation, that in compounding for groſs crimes, a fine, or *fredum*, ſhould be paid to the fiſk, over and above what the perſon injured was entitled to claim.

It cannot be doubted, that the compoſitions for crimes eſtabliſhed by law, paved the way to theſe improved notions of government. Compoſitions were firſt ſolicited, and afterward enforced by the legiſlative authority. It was now no longer a novelty for the chief magiſtrate to interpoſe in private quarrels. Reſentment was now no longer permitted to rage, but was brought

brought under ſome diſcipline: And this reformation, however burdenſome to an individual during a fit of paſſion, was agreeable to all in their ordinary ſtate of mind. The magiſtrate, having thus acquired ſuch influence even in private puniſhment, proceeded naturally to aſſume the privilege of avenging wrongs done to the public merely, where no individual is hurt. And in this manner was the power of puniſhing crimes againſt the ſtate, eſtabliſhed in the chief magiſtrate.

To public crimes in the ſtricteſt ſenſe where no individual is hurt, was at firſt this new-aſſumed privilege confined. In the laws of the Bavarians *, we find that the goods of thoſe who contract marriage within the prohibited degrees, are confiſcated. In the laws of King Ina †, he who fights in the King's houſe forfeits all his ſubſtance, and his life is to be in the king's power. The judge who knowingly doth injuſtice, ſhall loſe his liberty, unleſs the king admit him to redeem the ſame ‡.

It being once eſtabliſhed, that there is a public, that this public is a politic body, which, like a real perſon, may ſue and defend, and in particular is entitled to reſent injuries; it was an eaſy ſtep, as hinted above, to intereſt the public

* Tit. 6. § 1. † Lambard's Collection, law 6.

‡ Laws of William the Conqueror, Wilkins's edition, law 41.

public even in private crimes, by imagining every atrocious crime to be a public as well as a private injury; and in particular, that by every open act of violence, the peace of the public or country is broke. In the oldeſt compoſitions for crimes that are recorded, there is not a word of the public; the whole is given to the private party. In the Salic laws, there is a very long liſt of crimes, and of their converſion in money, without any fine to the public. But in the tables of compoſitions for crimes among the Burgundians, Allamanni, and Longobards, ſuppoſed to be more recent, there is conſtantly ſuperadded a fine, or *fredum*, to the king. And in the laws of King Canute *, "If murder be "committed in a church, a full compenſation "ſhall be paid to JESUS CHRIST, another full "compenſation to the king, and a third to the "relations of the deceaſed." The two firſt compoſitions, are evidently founded upon the foregoing ſuppoſition, that the peace of the church, and the king's peace, are broke by the murder.

After eſtabliſhing compoſitions for crimes, which proved a very lucky exertion of legal authority, the public had not hitherto claimed any privilege but what belonged to every private perſon, viz. that of proſecuting its own reſentment. But this practice of converting puniſhment

* Lambard's Collection, law 2.

ment into money, a wiſe inſtitution indeed to prevent a greater evil, was yet, in itſelf, too abſurd to be for ever ſupported againſt enlightened reaſon. Certain crimes came to be reckoned too flagrant and atrocious to admit a pecuniary converſion; and, perhaps, the lowneſs of the converſion contributed to this thought; for compoſitions eſtabliſhed in days of poverty, bore no proportion to crimes after nations became rich and powerful. That this was the caſe of the old Roman compoſitions, every one knows who has dipped into their hiſtory. This evil required a remedy, and it was not difficult to find one. It had long been eſtabliſhed, that the perſon injured had no claim but for the compoſition, however diſproportioned to the crime. Here then was a fair opportunity for the king, or chief magiſtrate, to interpoſe, and to decree an adequate puniſhment. The firſt inſtances of this kind had probably the conſent of the perſon injured; and it is not difficult to perſuade any man of ſpirit, that it is more for his honour, to ſee his enemy condignly puniſhed, than to put up with a trifling compenſation in money. However this be, the new method of puniſhing atrocious crimes gained credit, became cuſtomary, and paſſed into a law. If a puniſhment was inflicted adequate to the crime, there could be no claim for a compoſition, which would be the ſame as paying a debt twice. And thus,

thus, though indirectly, an end was put to the right of private puniſhment in all matters of importance.

Theft is a crime that greatly affected the public after the ſecurity of property came to be a capital object; and therefore theft afforded probably the firſt inſtances of this new kind of puniſhment. It was enacted in England, That a thief, after repeated acts, ſhall have his hand or foot cut off *. Among the Longobards, the third act of theft was puniſhed with death †. By the Salic laws, theft was puniſhed with death, if proved by ſeven or five credible witneſſes ‡. And that the firſt inſtances of this new puniſhment had the conſent of the perſon injured, is made probable from the ſame Salic laws, in which murder was puniſhed with death, and no compoſition admitted without conſent of the friends of the deceaſed ‖.

A power to puniſh all atrocious crimes, though of a private nature, was a valuable acquiſition to the public. This acquiſition was ſupported by the common ſenſe of mankind, which, as obſerved in the beginning of this diſcourſe, entitles even thoſe to inflict puniſhment who are not injured by the crime; and if ſuch privilege belong to private perſons, there could be no doubt that the

* Laws of King Ina, Lambard's Collection, law 18.
† L. 1. tit. 25. § 67. ‡ Tit. 70. § 7.
‖ Tit. 70. § 5.

the magiſtrate was peculiarly privileged. Here, by the way, may be remarked, a ſtriking inſtance of the aptitude of man for ſociety. By engroſſing the right of puniſhing, government acquired great vigour. But did nature dictate that none have right to puniſh but thoſe who are injured, government muſt for ever have remained in its infantine ſtate: for, upon that ſuppoſition, I can diſcover no means ſufficient to contradict human nature ſo far, as to confine to the magiſtrate the power of diſpenſing puniſhments.

The criminal juriſdiction of the magiſtrate being thus far advanced, was carried its full length without meeting any longer with the ſlighteſt obſtruction. Compoſitions for crimes were prohibited, or wore out of practice; and the people were taught a ſalutary doctrine, That it is inconſiſtent with good government to ſuffer individuals to exert their reſentment, otherwiſe than by applying to the criminal judge; who, after trying the crime, directs an adequate puniſhment to be inflicted by an officer appointed for that purpoſe; admitting no other gratification to the perſon injured, but to ſee the ſentence put in execution, if he be pleaſed to indulge his reſentment ſo far.

But as this ſignal revolution in the criminal law, muſt have been galling to individuals, unaccuſtomed

accuſtomed to reſtrain their paſſions (8), all meaſures

(8) For ſome time after this revolution was completed, we find, among moſt European nations, certain crimes prevailing, one after another, in a regular ſucceſſion. Two centuries ago, aſſaſſination was the crime in faſhion. It wore out by degrees, and made way for a more covered, but more deteſtable method of deſtruction, and that is poiſon. This horrid crime was extremely common, in France and Italy chiefly, almoſt within a century. It vaniſhed imperceptibly, and was ſucceeded by a leſs diſhonourable method of exerciſing revenge, viz. duelling. This curious ſucceſſion is too regular to have been the child of accident. It muſt have had a regular cauſe; and this cauſe, I imagine, may be gathered from the hiſtory now given of the criminal law. We may readily believe, that the right of puniſhment, wreſted from individuals and transferred to the magiſtrate, was at firſt ſubmitted to with the utmoſt reluctance. Reſentment is a paſſion too fierce to be ſubdued till man be firſt humanized and ſoftened in a long courſe of diſcipline, under the awe and dread of a government firmly eſtabliſhed. For many centuries after the power of the ſword was aſſumed by the magiſtrate, individuals, prone to avenge their own wrongs, were inceſſantly breaking out into open violence, murder not excepted. But the authority of law, gathering ſtrength daily, became too mighty for revenge executed in this bold manner; and open violence, through the terror of puniſhment, being repreſſed, aſſaſſination was committed privately, in place of murder committed openly. But as aſſaſſination is ſeldom practicable without accomplices or emiſſaries of abandoned morals, experience ſhowed that this crime is never long concealed; and the fear of detection prevailed at laſt over the ſpirit

of

measures were taken to make the yoke eaſy, by directing ſuch a puniſhment as tended the moſt to gratify the perſon injured. Whether this was done in a political view, or through the ſtill ſubſiſting influence of the right of private revenge,

of revenge, gratified in this hazardous manner. More ſecret methods of gratification were now ſtudied. Aſſaſſination repreſſed made way for poiſoning, the moſt dangerous peſt that ever invaded ſociety, if, as believed, poiſon can be conveyed in a letter, or by other latent means that cannot be traced. Here legal authority was at a ſtand; for how can a criminal be reached who is unknown? But nature happily interpoſed, and afforded a remedy when law could not. The gratification which poiſoning affords, muſt be extremely ſlight, when the offender is not made ſenſible from what quarter the puniſhment comes, nor for what cauſe it is inflicted. Repeated experience ſhowed the emptineſs of this method of avenging injuries; a method which plunges a man in guilt, without procuring him any gratification. This horrid practice accordingly, had not a long courſe. Conſcience and humanity exerted their lawful authority, and put an end to it. Such, in many inſtances, is the courſe of Providence. It exerts benevolent wiſdom in ſuch a manner as to bring good out of evil. The crime of poiſoning is ſcarce within the reach of the magiſtrate: But a remedy is provided in the very nature of its cauſe; for, as obſerved, revenge is never gratified unleſs it be made known to the offender that he is puniſhed by the perſon injured. To finiſh my reflections upon this ſubject, duelling, which came in the laſt place, was ſupported by a notion of honour; and the ſtill ſubſiſting propenſity to revenge blinded men ſo much, as to make them ſee but obſcurely, that the practice is inconſiſtent with conſcience and humanity.

revenge, is not material. But the fact is curious, and merits attention; becauſe it unfolds the reaſon of that variation of puniſhment for the ſame crime, which is remarkable in different ages. With reſpect to theft, the puniſhment among the Bavarians was increaſed to a ninefold reſtitution, calculated entirely to ſatisfy the perſon injured, before they thought of a corporal puniſhment *. The next ſtep was dememberation, by cutting off the hand or foot; but this only after repeated acts †. Among the Longobards, it required a third act of theft before a capital puniſhment could be inflicted ‡. And at laſt theft was to be puniſhed with death in all caſes, if clearly proved ‖. By this time, it would appear, the intereſt of the public, with reſpect to puniſhment, had prevailed over private intereſt; or at leaſt had become ſo weighty as to direct a puniſhment that ſhould anſwer the purpoſe of terror, as well as of private reſentment. There is a curious fact relating to the puniſhment of theft, which muſt not be overlooked. By the laws of the Twelve Tables, borrowed from Greece, theft was puniſhed with death in a ſlave, and with ſlavery in a free man. But this law was afterwards mitigated, by converting the puniſhment into a pecuniary compoſition; ſubjecting the *furtum manifeſtum* to a fourfold

* Tit. 8. § 1. † Laws of King Ina, Lambard, l. 18.
‡ L. 1. tit. 25. § 67. ‖ Salic Laws, tit. 70. § 7.

fourfold reſtitution, and the *furtum nec manifeſtum*, to the reſtitution of double. The puniſhment of theft, eſtabliſhed by the law of the Twelve Tables, might ſuit ſome of the civilized ſtates in Greece, which had acquired the notion of a public, and of the intereſt which a public has to puniſh crimes *in terrorem*. But the law was unſuitable to the notions of a rude people, ſuch as the Romans were in thoſe days, who of puniſhment underſtood no other end but the gratification of private reſentment. Nor do I find in any period of the Roman hiſtory, that theft was conſidered as a crime againſt the public, to admit of a puniſhment *in terrorem*. Toward ſuch improvement there never was a ſtep taken but one, which was not only late, but extremely ſlight, viz. that a thief might be condemned to an arbitrary puniſhment, if the party injured inſiſted for it *.

I make another remark, that ſo long as the gratification of the proſecutor was the chief aim in puniſhing theft, the value of the ſtolen goods was conſtantly conſidered as a preferable claim †; for unleſs the proſecutor obtain reſtitution of his goods, or their value, there can be no ſufficient gratification. But after the intereſt of the public came chiefly to be conſidered in puniſhing theft, the proſecutor's claim of reſtitution

* L. ult. De furtis.

† Judicia civitatis Lundoniae, Wilkins, p. 65.

tution was little regarded; of which our act 26. parl. 1661, is clear evidence; witneſs alſo the law of Saxony, by which if a thief ſuffer death, his heir is not bound to reſtore the ſtolen goods *.

For the ſame reaſon, a falſe witneſs is now puniſhed capitally in Scotland, though not ſo of old. By the Roman law †, and alſo by our common law ‡, the puniſhment of falſehood is not capital; which is alſo clear from act 80. parl. 1540, and act 22. parl. 1551. Yet our ſupreme criminal court has, for more than a century, aſſumed the power of puniſhing this crime capitally, as well as that of bearing falſe witneſs, though warranted by no ſtatute. The notions of a public, and of a public intereſt, are brought to perfection; and the intereſt of the public to be ſevere upon a crime ſo prejudicial to ſociety, hath in theſe inſtances prevailed over even the ſtrict rules of the criminal law (9).

(9) Durum eſt, torquere leges ad hoc ut torqueant homines. Non placet igitur extendi leges poenales, multo minus capitales, ad delicta nova. Quod ſi crimen vetus fuerit, et legibus notum, ſed proſecutio ejus incidat in caſum novum a legibus non proviſum; omnino recedatur a placitis juris, potius quam delicta maneant impunita. *Bacon de augmentis ſcientiarum, l.* 8. *cap.* 3. *aphor.* 13.

By

* Carpzovius, part 4. conſt. 32. def. 23.

† L. 1. § ult. De leg. Cornel. de falſ.

‡ Reg. Maj. l. 4. cap. 13.; Stat. Alex. II. cap. 19.

Upon this head an obſervation occurs, which will be found to hold univerſally. It regards a material point, that of adjuſting puniſhments to crimes, when criminal juriſdiction is totally engroſſed by the public. After this revolution in government, puniſhments at firſt are found extremely moderate; not only for the reaſon above given that they are directed chiefly to gratify the perſons injured, but for a ſeparate reaſon. Though the power of the ſword adds great authority to a government, yet this effect is far from being inſtantaneous; and till authority be fully eſtabliſhed, great ſeverities are beyond the ſtrength of a legiſlature. But when public authority is firmly rooted in the minds of the people, puniſhments more rigorous may be ventured upon, which are rendered neceſſary by the yet undiſciplined temper of the people. At laſt, when a people have become altogether tame and ſubmiſſive under a long and ſteady adminiſtration, puniſhments, being leſs and leſs neceſſary, are commonly mild, and ought always to be ſo (10).

By the law of Egypt, perjury was capital: for it was ſaid to involve the two greateſt crimes, viz. impiety to the gods, and violation of faith and truth to man. *Diodorus Siculus*, *book* 1. *ch.* 6. This, and many other laws of the ancient Egyptians ſhow, that public police was carried to a conſiderable degree of perfection in that celebrated country.

(10) We diſcover a ſimilar progreſs in the Civil Law of this country. Some ages ago, before the ferocity of the inhabitants

Another obſervation occurs, connected with the former, that to preſerve a ſtrict proportion betwixt a crime and its puniſhment, is not the only or chief view of a wiſe legiſlature. The purpoſes of human puniſhments are, firſt, to add weight to thoſe which nature has provided, and next to enforce municipal regulations intended for the good of ſociety. In this view, a crime, however heinous, ought to be little regarded, if it had no bad effect in ſociety. On the other hand, a crime, however ſlight, ought to be ſeverely puniſhed, if it tend greatly to diſturb the

inhabitants of this part of the iſland was ſubdued, the utmoſt ſeverity of the Civil Law was neceſſary to reſtrain individuals from plundering each other. Thus the man who intermeddled irregularly with the moveables of a perſon deceaſed, was ſubjected to all the debts of the deceaſed without limitation. This makes a branch of the law of Scotland, known by the name of *Vitious Intromiſſion*; and ſo rigidly was this regulation applied in our courts of law, that the moſt trifling moveable abſtracted *mala fide*, ſubjected the intermeddler to the foregoing conſequences, which proved, in many inſtances, a moſt rigorous puniſhment. But ſeverity was neceſſary, in order to ſubdue the rude manners of our people. In proportion to our improvement in manners, this regulation was gradually ſoftened, and applied by our ſovereign court with a ſparing hand. It is at preſent ſo little in repute, that the vitious intromiſſion muſt be extremely groſs which provokes the judges to give way to the law in its utmoſt extent; and it ſeldom happens, that vitious intromiſſion is attended with any conſequence beyond reparation, and coſts of ſuit.

peace of ſociety. A diſpute about the ſucceſſion to a crown, ſeldom ends without a civil war, in which the party vanquiſhed, however zealous for right and for the good of their country, muſt be conſidered as guilty of treaſon againſt their lawful ſovereign; and to prevent the ruin of civil war, it becomes neceſſary that ſuch treaſon be attended with the ſevereſt puniſhment; without regarding that the guilt of thoſe who ſuffer aroſe from bad ſucceſs merely. Hence, in regulating the puniſhment of crimes, two circumſtances ought to weigh, viz. the immorality of the action, and its bad tendency; of which the latter appears to be the capital circumſtance, as the peace of ſociety is an object of much greater importance, than the peace, or even life, of a few individuals.

One great advantage, among many, of tranſferring to the magiſtrate the power of puniſhment, is, that revenge is kept within the ſtricteſt bounds, and confined to its proper objects. The criminal law was in perfection among the ancient Egyptians. Among them, a woman with child could not be put to death till ſhe was delivered. And our author Diodorus Siculus * obſerves, That this law was received by many of the Greek ſtates, deeming it unjuſt that the innocent ſhould ſuffer with the guilty; and that a child, common to father and mother, ſhould loſe its

* Book 1. ch. 6.

its life for the crime of the mother. The power to puniſh muſt have long been the privilege of the magiſtrate, before a law ſo moderate and ſo impartial could take place. We find no ſimilar inſtance while puniſhment was in the hands of individuals: Such moderation is incompatible with the partiality of man, and the inflammable nature of reſentment. Nor is this the only inſtance of wiſdom and moderation in the criminal law of the country now mentioned. Capital puniſhments are avoided as much as poſſible; and in their ſtead puniſhments are choſen, that, equally with death, reſtrain the delinquent from committing the crime a ſecond time. In a word, the ancient Egyptian puniſhments have the following peculiar character, that they effectually anſwer their end, with leſs harſhneſs and ſeverity, than is found in the laws of any other nation ancient or modern. Thus thoſe who revealed the ſecrets of the army to the enemy, had their tongues cut out. Thoſe who coined falſe money, or contrived falſe weights, or forged deeds, or razed public records, were condemned to loſe both hands. He who committed a rape upon a free woman, was deprived of his privy members; and a woman committing adultery, was puniſhed with the loſs of her noſe, that ſhe might not again allure men to wantonneſs (11).

(11) We have an inſtance in this law of ſtill greater refinement:

I have one thing further to add upon public puniſhment. Though all civilized nations have agreed

refinement. The criminal law of other civilized nations, has not, in any inſtance, a farther aim than to prevent injury and miſchief. Egypt is the only country we read of, where individuals were obliged to aid the diſtreſſed, under a penalty. In the table of laws recorded by the above-mentioned author, we read the following paſſage: "If a man be violently aſſaulted and in hazard of death, "it is the duty of every by-ſtander to attempt a reſcue; "and if it be proved againſt ſuch a man, that he was "ſufficiently able to prevent the murder, his neglect or "forbearance is to be puniſhed with death." It is altogether concordant with the refined ſpirit of the other laws mentioned by our author, that relieving the diſtreſſed ſhould be made the duty of every individual: But to puniſh with death an act of omiſſion, or a neglect of any duty, far more the neglect of a duty ſo refined, muſt ariſe from the moſt exalted notions of morality. Government muſt have arrived at great perfection, before ſuch a regulation could be admitted. None of the preſent European nations are even at preſent ſo far refined as to admit of ſuch a law. There muſt be ſome cauſe, natural or artificial, for ſuch early perfection of the criminal law in Egypt; and as the ſubject is of importance in tracing the hiſtory of mankind, I cannot reſiſt the preſent opportunity of attempting to inveſtigate the cauſe.

Hunting and fiſhing for ſuſtenance, were the original occupations of men. The ſhepherd life ſucceeded; and the next ſtage was that of agriculture. Theſe progreſſive changes, in the order now mentioned, may be traced in all nations, as far as we have any remains of their original hiſtory. The life of a fiſher or hunter is averſe to ſociety, except among the members of ſingle families.

The

agreed to forbid private revenge, and to truſt puniſhment, whether of public or private crimes, in

The ſhepherd-life promotes larger ſocieties; if that can be called a ſociety, which hath ſcarce any other but a local connection. The true ſpirit of ſociety, which conſiſts in mutual benefits, and in making the induſtry of individuals profitable to others as well as to themſelves, was not known till agriculture was invented. Agriculture requires the aid of many other arts: the carpenter, the blackſmith, the maſon, and other artificers, contribute to it. This circumſtance connects individuals in an intimate ſociety of mutual ſupport, which again compacts them within a narrow ſpace. Now in the firſt ſtate of man, that of hunting and fiſhing, there obviouſly is no place for government, except that which is exerciſed by the heads of families over children and domeſtics. The ſhepherd-life, in which ſocieties are formed by the conjunction of families for mutual defence, requires ſome ſort of government; ſlight indeed in proportion to the ſlightneſs of the mutual connection. But it was agriculture which firſt produced a regular ſyſtem of government. The intimate union among a multitude of individuals, occaſioned by agriculture, diſcovered a number of ſocial duties formerly unknown. Theſe were aſcertained by laws, the obſervance of which was enforced by puniſhment. Such operations cannot be carried on, otherwiſe than by lodging power in one or more perſons, to direct the reſolutions and apply the force of the whole ſociety. In ſhort, it may be laid down as an univerſal maxim, That in every ſociety, the advances of government toward perfection, are ſtrictly proportioned to the advances of the ſociety toward intimacy of union.

The condition of the land of Egypt makes huſbandry of abſolute neceſſity; becauſe in that country, without huſbandry

in the hands of diſintereſted judges; yet they differ as to the perſons who are allowed to pro-

ſecute

huſbandry there are no means of ſubſiſtence. All the ſoil, except what is yearly covered with the river when it overflows, is a barren ſand unfit for habitation, and the people are confined to the low grounds adjacent to the river. The ſandy grounds produce little or no graſs; and however fit for paſture the low grounds may be during the bulk of the year, the inhabitants, without agriculture, would be deſtitute of all means to preſerve their cattle alive during the inundation. The Egyptians muſt therefore, from the beginning, have depended upon huſbandry for their ſubſiſtence; and the ſoil, by the yearly inundations, being rendered extremely fertile, the great plenty of proviſions produced by the ſlighteſt culture, could not fail to multiply the people exceedingly. But this people lived in a ſtill more compact ſtate, than is neceſſary for the proſecution of huſbandry in other countries; becauſe their cultivated lands were no leſs narrow than fertile. Individuals, thus collected within very narrow bounds, could not ſubſiſt a moment without regular government. The neceſſity, after every inundation, of adjuſting marches by geometry, naturally productive of diſputes, muſt have early taught the inhabitants of this wonderful country, the neceſſity of due ſubmiſſion to legal authority. Joining all theſe circumſtances, we may aſſuredly conclude, that in Egypt government was coeval with the peopling of the country; and this perhaps is the ſingle inſtance of the kind. Government therefore muſt have long ſubſiſted among the Egyptians in an advanced ſtate; and for that reaſon it ceaſes to be a wonder, that their laws were brought to perfection more early than thoſe of any other people.

This,

ſecute before theſe judges. In Rome, where there was no *calumniator publicus*, no attorney-general, every one was permitted to proſecute crimes that have a public bad tendency, and for that reaſon are termed *public crimes*. This was a faulty inſtitution; becauſe ſuch a privilege given to individuals, could not fail to be frequently made the inſtrument of venting private ill-will and revenge. The oath of calumny, which was the firſt check thought of, was far from reſtraining this evil. It grew to ſuch a height, that the Romans were obliged to impoſe another check upon criminal proſecutors, indeed of the ſevereſt kind, which ſhall be given in Voet's

This, at the ſame time, accounts for the practice of heiroglyphics, peculiar to this country. In the adminiſtration of public affairs, writing is in a great meaſure neceſſary. The Egyptian government had made vigorous advances toward perfection before writing was invented. A condition ſo ſingular, occaſioned neceſſarily a ſtrong demand for ſome method to publiſh laws, and to preſerve them in memory. This produced hieroglyphical writing, if the emblems made uſe of to expreſs ideas can be termed writing.

Public police appears in ancient Egypt to have been carried to an eminent degree of perfection, in other articles as well as in that of law. We have the authority of Ariſtotle, *Polit. l.* 3. *ch.* 15. and of Herodote, *l.* 2. That in Egypt the art of phyſic was diſtributed into ſeveral diſtinct parts, that every phyſician employed himſelf moſtly in the cure of a ſingle diſeaſe, and that by this means the art was brought to great perfection.

words * : " Ne autem temere quis per accuſa-
" tionem in alieni capitis diſcrimen irruerit,
" neve impunita eſſet in criminalibus mentien-
" di atque calumniandi licentia, loco jurisju-
" randi calumniae adinventa fuit in crimen ſub-
" ſcriptio, cujus vinculo cavet quiſque quod
" crimen objecturus ſit et in ejus accuſatione
" uſque ad ſententiam perſeveraturus, dato eum
" in finem fidejuſſore; ſimulque ad talionem
" ſeu ſimilitudinem ſupplicii ſeſe obſtringet, ſi
" in probatione defeciſſe et calumniatus eſſe de-
" prehenſus fuerit." Had the Roman law continued to flouriſh any conſiderable time after this regulation, we may be pretty certain it muſt have been altered. It was indeed a complete bar to accuſations true or falſe; for what man will venture his life and fortune, in bringing to puniſhment a criminal who hath done him no injury, however beneficial it may be to the ſtate to have the criminal deſtroyed? This would be an exertion of public ſpirit, ſcarce to be expected among the moſt virtuous people, not to talk of times of univerſal corruption and depravity.

In modern governments, a better method is invented. The privilege of proſecuting public crimes belongs to the chief magiſtrate. The King's Advocate in Scotland is *calumniator publicus*; and there is delegated to him from the crown,

* Tit. De accuſationibus et inſcriptionibus, § 13.

crown, the privilege of profecuting public crimes. In England, perfonal liberty has, from the beginning, been more facred than in Scotland; and to prevent the oppreffion of criminal profecutions, there is in England a regulation much more effectual than that now mentioned. A grand jury is appointed in every county for a previous examination of capital crimes intended to be profecuted in name of the crown; and they muft find a *billa vera*, as it is termed, without which the trial cannot proceed. But the crown is not tied to that form. A criminal trial may proceed on an information, without any previous examination by a grand jury.

With refpect to private crimes, where individuals are hurt in their perfons, goods, or character, the public, and the perfon injured, have each of them feparately an intereft. The King's Advocate may profecute fuch crimes alone, as far as the public is concerned in the punifhment. The private party is intereffed to obtain reparation for the wrong done him. Even where this is the end of the profecution, our forms require the concurrence of the King's Advocate, as a check upon the profecutor, whofe refentment otherwife may carry him beyond proper bounds. But this concurrence muft be given, unlefs the Advocate will take upon him to fhow, that there is no foundation for the profecution; for the Advocate cannot bar the private party from the reparation

reparation due him by law; more than the private party can bar the Advocate from exacting that reparation or punishment which is a debt due to the public.

The interposition of the sovereign authority, to punish crimes more severely than by a composition, was at first, we may believe, not common; nor to be obtained at any rate, unless where the atrocity of the crime called aloud for an extraordinary punishment. But it happened in this, as in all similar cases where novelty wears off by reiteration of acts, that what at first is an extraordinary remedy, comes in time to be reckoned a branch of common law. There being at first, however, no rule established for the King's interposition, it was understood to be a branch of his prerogative to interpose or not at his pleasure; and to direct an extraordinary punishment, or to leave the crime to the composition of common law. Though evidently this prerogative could not regularly subsist after criminal jurisdiction was totally engrossed by the public; yet our forefathers were not so clear-sighted. The prerogative now mentioned, was misapprehended for a power of pardoning even after sentence; and the resemblance of the cases made way for the mistake. It appears to me, that the King's prerogative of pardoning arbitrarily, which is asserted by all lawyers, can have no foundation other than this now assigned.

Were

Were it limited in criminal as in civil caſes, not to give relief but where ſtrict law is over-balanced by equity, the prerogative would have a more rational foundation. But we muſt proſecute the thread of our hiſtory. Though the option of inflicting an adequate puniſhment, or leaving the crime to common law, was imperceptibly converted into an arbitrary power of pardoning even after ſentence; yet the foundation of this new prerogative was not forgot. The King's pardon is held as leaving the crime to common law, by which the perſon injured is entitled to a compoſition. And the evident injuſtice of a pardon upon any other condition, tends no doubt to ſupport this conſtruction: For it would be groſs injuſtice, that the law ſhould ſuffer a man to be injured, without affording him any ſatisfaction, either by a public puniſhment, or by a private compoſition. This, however, it would appear, has been attempted. But the matter was ſettled by a law of Edward the Confeſſor *, declaring, That the King, by his prerogative, may pardon a capital crime; but that the criminal muſt ſatisfy the perſon injured, by a juſt compoſition.

Thus the *Vergelt*, or compoſition for crimes, which obtained in all caſes by our old law, is ſtill in force where the criminal obtains a pardon; and the claim that the relations of the deceaſed

* Lambard's Collection, law 18.

deceaſed have againſt the murderer who obtains a pardon, known in the law of Scotland by the name of *aſſythment*, has no other foundation. The practice is carried farther, and may be diſcovered even in civil actions. When a proceſs of defamation is brought before a civil court, or a proceſs for any violent inverſion of poſſeſſion, a ſum is generally decreed in name of damages, proportioned to the wrong done; even where the purſuer cannot ſpecify any hurt or real damage. Such a ſentence can have no other view, but to gratify the reſentment of the perſon injured, who has not the gratification of any other puniſhment. It is given, as lawyers ſay, *in ſolatium*; and therefore is obviouſly of the nature of a *Vergelt*, or compoſition for a crime. Damages awarded to a huſband, againſt the man who corrupts his wife, or againſt the man who commits a rape upon her, are preciſely of the ſame nature.

In taking a review of the whole, the manners and temper of ſavages afford no agreeable proſpect. But man excels other animals, chiefly by being ſuſceptible of high improvements in a well-regulated ſociety. In his original ſolitary ſtate, he is ſcarce a rational being. Reſentment is a paſſion, that, in an undiſciplined breaſt, appears to exceed all bounds. But ſavages are fierce and brutal; and the paſſion of reſentment is in the ſavage ſtate the chief protection that a man

man hath for his life and fortune. It is therefore wisely ordered, that resentment should be a ruling passion among savages. Happy it is for civilized societies, that the authority of law hath in a good measure rendered unnecessary this impetuous passion; and happy it is for individuals, that early discipline under the restraint of law, by calming the temper and sweetening manners, hath rendered it a less troublesome guest than it is by nature.

TRACT II.

PROMISES and COVENANTS.

MORAL principles, faint among ſavages, acquire ſtrength by refinement of manners in poliſhed ſocieties *. Promiſes and covenants, in particular, have full authority among nations diſciplined in a long courſe of regular government: But among barbarians it is rare to find a promiſe or covenant of ſuch authority as to counterbalance, in any conſiderable degree, the weight of appetite or paſſion. This circumſtance, joined with the imperfection of a language in its infancy, are the cauſes why engagements are little regarded in original laws.

It is lucky, that among a rude people in the firſt ſtages of government, the neceſſity of engagements is not greater than their authority. Originally, every family ſubſiſted by hunting, and by the natural fruits of the earth. The taming wild animals, and rendering them domeſtic, multiplied greatly the means of ſubſiſtence. The invention of agriculture produced to

* See Eſſays on the Principles of Morality and Natural Religion, part 1. eſſay 2. ch. 9.

to the induſtrious a ſuperfluity, with which foreign neceſſaries were purchaſed. Commerce originally was carried on by barter or permutation, to which a previous covenant is not neceſſary. And after money was introduced into commerce, we have reaſon to believe, that buying and ſelling alſo was at firſt carried on by exchanging goods for money, without any previous covenant. But in the progreſs of the ſocial life, the wants and appetites of men multiply faſter than to be readily ſupplied by commerce ſo narrow and confined. There came to be a demand for interpoſed perſons, who take care to be informed of what is redundant in one corner, and of what is wanted in another. This occupation was improved into that of a merchant, who provides himſelf from a diſtance with what is demanded at home. Then it was, and no ſooner, that the uſe of a covenant came to be recogniſed; for the buſineſs of a merchant cannot be carried on to any extent, or with any ſucceſs, without previous agreements.

As far back as we can trace the Roman law, we find its authority interpoſed in behalf of ſale, location, and other contracts deemed eſſential to commerce. And that commerce was advanced in Rome before action was ſuſtained upon ſuch contracts, is evident from the contract of ſociety or partnerſhip put in that claſs. Other covenants were not regarded, but left upon the

obligation of the natural law. One general exception there was: A promiſe or paction, of whatever nature, executed in a ſolemn form of words, termed *ſtipulatio*, was countenanced with an action. This ſolemn manner of agreement, teſtified the deliberate purpoſe of the parties; and at the ſame time removed all ambiguity as to their meaning, to which language in its infancy is liable (1).

Courts

(1) A naked promiſe, which is a tranſitory act, makes but a ſlender impreſſion upon the mind among a rude people. Hence it is, that after the great utility of conventions came to be diſcovered in the progreſs of the ſocial life, we find certain ſolemnities uſed in every nation, to give conventions a ſtronger hold of the mind than they have naturally. The Romans and Grecians, after their police was ſomewhat advanced, were ſatisfied with a ſolemn form of words. Ouvert acts were neceſſary among other people, leſs refined. The ſolemnity uſed among the Scythians, according to Herodotus, *book* 4. is curious. "The Scythians (ſays that author), in their alliances and contracts, uſe the following ceremonies. "They pour wine into an earthen veſſel, and tinge it "with blood drawn from the parties contractors. They "dip a ſcymeter, ſome arrows, a bill, and a javelin, in "the veſſel, and after many imprecations, the perſons "principally concerned, with the moſt conſiderable men "preſent, drink the liquor." Among other barbarous nations, ancient and modern, we find ceremonies contrived for the ſame end. The Medes and Lydians, in their federal contracts, obſerve the ſame ceremonies with the Grecians; with this difference, that both parties wound themſelves in the arm, and then mutually lick the blood. —*Herodotus*,

Courts of law were a ſalutary invention in the ſocial ſtate; for by them individuals are compelled to do their duty. This invention, as commonly happens, was originally confined within narrow bounds. To take under the protection of a court, natural obligations of every ſort, would, in a new experiment, have been reckoned too bold. It was deemed ſufficient to enforce, by legal authority, thoſe particular duties that contribute moſt to the well-being of ſociety. A regulation ſo important gave ſatisfaction; and, while recent, left no deſire or thought of any farther improvement. This

—*Herodotus, book* 1.——The Arabians religiouſly obſerve contracts that are attended with the following ceremonies. A perſon ſtanding between the parties, draws blood from both, by making an inciſion with a ſharp ſtone in the palm of the hand under the longeſt fingers; and cutting a thread from the garment of each, dips it in the blood, and anoints ſeven ſtones brought there to that end; invoking their gods, Bacchus and Urania, and exhorting the parties to perform the conditions. The ceremony is cloſed with a mutual profeſſion of the parties, that they are bound to perform.—*Ibid. book* 3. ——The Naſamones of Africa, in pledging their faith to each other, mutually preſent a cup of liquor; and if they have none, they take up duſt, which they put into their mouths.—*Ibid. book* 4.——To the ſame purpoſe is the ſtriking or joining hands; and a practice ſo frequent among the Grecians and Romans as to be introduced into their poetry, of ſwearing by the gods, by the tombs of their anceſtors, or by any other object of awe and reverence.

fairly accounts for what is obſerved above, that in the infancy of law, promiſes and agreements which make a figure are countenanced with an action, while others of leſs utility are left upon conſcience. But here it muſt be remarked, that this diſtinction is not made where the effect of a promiſe or agreement is not to create an obligation, but to diſſolve it. *Pacta liberatoria* have, in all ages, been enforced by courts of law. The reaſon commonly aſſigned, that liberty is more favourable than obligation, is not ſatisfactory; for no pactions merit more favour than thoſe which promote the good of ſociety, by obliging individuals to ſerve and aid each other. The following reaſon will perhaps be reckoned more ſolid. There is a wide difference betwixt refuſing action even where the claim is juſt, and ſuſtaining action upon an unjuſt claim. With reſpect to the former, all that can be complained of is, that the court is leſs uſeful than it might be: The latter would be countenancing, or rather enforcing, iniquity. It is not ſurpriſing to find courts confined within too narrow bounds, in point of utility: But it would be ſtrange indeed if it were made their duty to enforce wrong of any ſort. Thus where a court refuſes to make effectual a gratuitous promiſe, there is no harm done; matters are left where they were before courts were inſtituted. But it is undoubtedly unjuſt to demand payment of a debt

debt after it is diſcharged, though by a gratuitous promiſe only. And therefore, when in this caſe an action for payment is brought, the court has no choice: It cannot otherwiſe avoid ſupporting this unjuſt claim, but by ſuſtaining the gratuitous promiſe as a good defence againſt the action (2).

One caſe excepted, ſimilar to the Roman *ſtipulatio*, of which afterward, it appears to me that no naked promiſe or covenant was, by our forefathers, countenanced with an action. A contract of buying and ſelling was certainly not binding by the municipal law of this iſland, unleſs the price was paid, or the thing ſold delivered. There was *locus poenitentiae* even after arles were given; and change of mind was attended with no other penalty, but loſs of the arles, or value of them *. Our ancient writers are not ſo expreſs upon other covenants; but as permutation, or in place of it buying and

(2) This difference betwixt an action and an exception, ariſing from the original conſtitution of courts of law, is not peculiar to promiſes and covenants, but obtains univerſally. Thus, in the Roman law, the *exceptiones doli et metus*, were ſuſtained from the beginning; though for many ages after the Roman courts were eſtabliſhed, no action was afforded to redreſs wrong done by fraud or force. It was the *Praetor* who firſt gave an action, after it became his province to ſupply what was defective in the courts of common law.

* Reg. Maj. l. 3. cap. 10.; Fleta, l. 2. cap. 58. § 3. & 5.

ſelling, are of all the moſt uſeful covenants in common life, we may reaſonably conclude, that if an agreement of this kind was not made effectual by law, other agreements would not be more privileged.

The caſe hinted above as an exception, is where an agreement is made or acknowledged in the face of court, taken down in writing, and recorded in the books of the court *. For though this was done chiefly to make evidence, the ſolemn manner of making the agreement probably had the ſame effect with *ſtipulatio* in the Roman law, which tied both parties, and abſolutely barred repentance. And indeed the recording a tranſaction would be an idle ſolemnity, if the parties were not bound by it.

The occaſion of introducing this form, I conjecture to be what follows. In difficult or intricate caſes, it was an early practice for judges to interpoſe, by preſſing a tranſaction betwixt the parties; of which there are inſtances in the court of ſeſſion, not far back. This practice brought about many agreements betwixt litigants, which were always recorded in the court where the proceſs depended. The record was compleat evidence of the fact; and if either party broke the concord or agreement, a decree went againſt him without other proof †. The ſingular

* Glanvil, l. 10. cap. 8.; Reg. Maj. l. 3. cap. 4.

† See Glanvil, l. 8. cap. 1. 2. 3. &c.

ſingular advantages of a concord or tranſaction thus finiſhed in face of court, moved individuals to make all their agreements, of any importance, in that form. And indeed, while writing continued a rare art, ſkilful artiſts, except in courts of juſtice, were not eaſily found readily to take down a covenant in writing.

So much upon the firſt head, How far naked covenants and promiſes were effectual by our old law. What proof of a bargain was required by a court of juſtice, comes next to be examined. Evidence may juſtly be diſtinguiſhed into natural and artificial. To the former belong proof by witneſſes, by confeſſion of the party, and by writ. To the latter belong thoſe extraordinary methods invented in days of groſs ſuperſtition, for bringing out the truth in doubtful caſes, ſuch as the trial by fire, the trial by water, and ſingular battle.

Before writing was invented, or rather while, like painting, it was in the hands of a few artiſts, witneſſes were relied on for evidence in all caſes. Witneſſes were in particular admitted for proving a debt to whatever extent, as well as for proving payment. But experience diſcovered both the danger and uncertainty of ſuch evidence; which therefore was confined within narrower bounds gradually as the art of writing became more common. It was firſt eſtabliſhed, that two witneſſes were not ſufficient

to

to prove a debt above forty ſhillings; and that there muſt be a number of witneſſes in proportion to the extent of the debt. Afterward, when the art of writing was more diffuſed, the King's courts took upon them to confine the proof of debt to writing, and the confeſſion of the party, leaving inferior judges to follow the common law, by admitting debt to be proved by witneſſes. This ſeems to be the import of Quon. Attach. cap. 81. and the only proper ſenſe that it can bear. The burghs adhered the longeſt to the common law *, by admitting two witneſſes to prove debt to any extent (3).

The King's courts aſſumed the like privilege in other actions. Though they admitted witneſſes to prove that a contract of ſale, for example, or location, was performed in part, in order to be a foundation for decreeing full performance; yet they permitted nothing to be proved

(3) This limitation of proof regards the conſtitution only of a debt. Payment being a more favourable plea, was left to the common law; and accordingly, in England, to this day, parole evidence is admitted to prove payment of money. The rule was the ſame in Scotland while our ſovereign court, named *the Daily Council*, ſubſiſted, as appears from the records of that court ſtill preſerved; and continued to be the rule till the act of ſederunt 8th June 1597 was made, declaring the reſolution of the court, That thereafter they would not admit witneſſes to prove payment of any ſum above 100 pounds.

* Curia quatuor burg. cap. 3. § 6.

proved by witneſſes, but what is cuſtomary in every covenant of the ſort. If any ſingular paction was alledged, ſuch an irritancy *ob non ſolutum canonem*, witneſſes were not admitted to prove ſuch pactions, more than to prove a claim of debt. The proof was confined to writ, or confeſſion of the party *.

The ſecond ſpecies of natural evidence, is, confeſſion of the party; which, in the ſtricteſt ſenſe, muſt be a confeſſion; that is, it muſt be voluntary. For, by the original law of this iſland, no man was bound to bear teſtimony againſt himſelf, whether in civil or criminal cauſes. So ſtands the common law of England to this day; though courts of equity take greater liberty. Our law was the ſame, till it came to be eſtabliſhed, through the influence of the Roman law, that in civil actions, the facts ſet forth in the libel or declaration may be referred to the defendant's teſtimony, and he be held as confeſſed if he refuſe to give his oath. The tranſition was eaſy from civil matters, to ſuch ſlight delinquencies as are puniſhed with pecuniary penalties in a civil court; and in theſe alſo, by our preſent practice, the perſon accuſed is obliged to give evidence againſt himſelf.

The diſcovery of truth by oath of party, denied in civil courts, was, in the eccleſiaſtical court, obtained by a circuit. An action for payment

* Glanvil, l. 10. cap. ult.; Reg. Maj. l. 3. cap. 14. § ult.

payment could not be brought before the eccleſiaſtical court; but in a religious view a complaint could be brought for breach of faith and promiſe. The party, as in the preſence of God, was bound to declare, whether he had not made the promiſe. The truth being thus drawn from him, he was of courſe enjoined, not only to do penance, but alſo to ſatisfy the complainer. This was in effect a decree, which was followed with the moſt rigorous execution for obtaining payment of the debt. And this by the by is the foundation of the privilege our commiſſary-courts have, of judging in actions of debt when the debt is referred to oath.

The third ſpecies of natural evidence is writ; which is of two kinds, viz. record of court, and writ executed privately betwixt parties. The firſt kind, which has already been mentioned, is in England termed *recogniſance*, becauſe debt is there acknowledged. And here it muſt be remarked, that this writ is of itſelf compleat evidence, ſo as to admit of no contrary averment, as expreſſed in the Engliſh law. But with reſpect to a private writ, it is laid down, that if the defendant deny the ſeal, the purſuer muſt verify the ſame by witneſſes, or by compariſon of ſeals; but that if he acknowledges it to be his ſeal, he is not permitted to deny the writ *. The preſumption lies, that it was he himſelf who ſealed

* Glanvil, l. 10. cap. 12.; Reg. Maj. l. 3. cap. 8.

ſealed the writ; unleſs he can bring evidence, that the ſeal was ſtolen from him, and put to the writ by another.

A deed hath ſprung from the recogniſance that requires peculiar attention. In England it is termed *a bond in judgment*, and with us *a bond regiſtrable*. When, by peace and regular government, this iſland came to be better peopled than formerly, it was extremely cumberſome to go before the judge upon every private bargain, in order to minute and record the ſame. After the art of writing was ſpread every where, a method was contrived to render this matter more eaſy. The agreement is taken down in writing; and, with the ſame breath, a mandate is granted to a procurator to appear in court, and to obtain the writ, to be recorded as the agreement of ſuch and ſuch perſons. If the parties happen to differ in performing the agreement, the writ is put upon record by virtue of the mandate; and faith is given to it by the court, equally as if the agreement had been recorded originally. The authority of the mandate is not called in queſtion, being joined with the averment of the procurator. And, from the nature of the thing, if faith be at all given to writ, the mind muſt reſt upon ſome fact, which is taken for granted without witneſſes. A bond, for example, is vouched by the ſubſcription of the granter, and the granter's ſubſcription by that of one or more

more witneſſes. But the ſubſcription of a witneſs muſt be held as true; for otherwiſe a chain of proof without end would be neceſſary, and a writ could never be legal evidence. The ſame ſolemnity is not neceſſary to the mandate, which being a relative deed, is ſupported by the bond or agreement to which it relates; and therefore, of ſuch a mandate we do not require any evidence but the ſubſcription of the party. The ſtile of this mandate was afterward improved, and made to ſerve a double purpoſe; not only to be an authority for recording the writ, but alſo to impower the procurator to confeſs judgment againſt his employer; on which a decree paſſes of courſe, in order for execution. The mandate was originally contained in a ſeparate writing, which continues to be the practice in England. In Scotland, the practice firſt crept in of indorſing it upon the bond, and afterward of ingroſſing it in the bond at the cloſe, which is our preſent form (4).

With

(4) Before the bond could be recorded as a decree in order for execution, it was required, that the procurator ſhould, by a writing under his hand, conſent to the decree. And when it became cuſtomary to indorſe the mandate upon the bond, this conſent was alſo indorſed upon it. But in courſe of time the conſent was neglected, as a ſtep merely of form; and the practice of recording without ſuch conſent, was authoriſed by an act of ſederunt 9th December 1670. So that the naming a procurator to confeſs judgment is now no longer neceſſary; and

With reſpect to the evidence of Engliſh bonds in judgment, and Scots bonds having a clauſe of regiſtration, there appears no difference: They bear full faith; and without any extraneous evidence are a ſufficient foundation for execution. The laws of England and of Scotland appear alſo to have been originally the ſame with reſpect to writs that need an action to make them effectual. The antient form of teſting a writ, was by the party's ſeal; and if the defendant denied the ſeal to be his, the purſuer as above mentioned was bound to prove the ſame. The law continued the ſame in both countries, when ſubſcription became neceſſary as well as the ſeal: If the defendant denied the ſubſcription to be his, it was incumbent on the purſuer to bring a proof of it, as formerly of the ſeal. In England to this day, if the defence *Non eſt factum* be pleaded, or, in other words, that the writ was not ſigned and ſealed by the defendant, the plaintiff muſt prove the affirmative. But in Scotland various checks have been introduced to prevent forgery: One of theſe checks is the ſubſcription of the witneſſes, required by act 5. parl. 1681, which vouches the party's ſubſcription. And as a bond thus fortified bears faith in judgment, the defendant is now

and indeed the conſent of the debtor that a decree ſhould paſs againſt him, is in all views ſufficient for execution, without any other ceremony.

now deprived of his negative defence, *Quod non eſt factum*; he muſt ſubmit to the claim, unleſs he undertake poſitively to prove that the ſubſcription is not his.

I cannot, upon this occaſion, overlook a remarkable impropriety in our old ſtatutes, requiring witneſſes to the ſubſcription of an obligor, without enjoining the witneſſes to ſubſcribe, in token that they did witneſs the obligor's ſubſcription. To appoint any act to be done, without requiring any evidence of its having been done, is undoubtedly an idle regulation. The teſting clauſe, it is true, bears, that the obligor ſubſcribed before ſuch and ſuch witneſſes. But the teſting clauſe, which in point of time goes before the ſubſcription of the obligor, cannot, otherwiſe than prophetically, be evidence that the witneſſes named ſaw the obligor ſubſcribe. This blunder is not found in the Engliſh law: For though witneſſes are generally called, and do often ſubſcribe; yet, according to my information, witneſſes are not eſſential by the law of England. This blunder in our law is corrected by the ſtatute 1681; enacting, "That "none but ſubſcribing witneſſes ſhall be pro- "bative, and not witneſſes inſert not ſubſcri- "bing." By this regulation the evidence of writ is now with us more compleat than it is in England. The ſubſcriptions of the witneſſes are juſtly held legal evidence of their having witneſſed

witneſſed the ſubſcription of the granter of the deed; and the ſubſcriptions muſt be held to be theirs; otherwiſe, as above obſerved, no writ can in any caſe afford legal evidence. And thus the evidence required in Scotland to give faith to a bond or other deed, is by this ſtatute made proper and rational. It is required that the granter ſubſcribe before witneſſes: But we no longer hold the teſting clauſe to be evidence of this fact: the ſubſcription of the witneſſes is the evidence, as it properly ought to be.

Of the artificial means uſed in a proceſs to diſcover truth, thoſe by fire and water (5) were diſcharged by Alexander II. *. And it is wonderful,

(5) This ſort of artificial trial prevailed in nations that had no communication with each other, which may be accounted for by the prevelancy of ſuperſtition. Among the Indians on the Malabar coaſt, when a man is to clear himſelf of ſome heinous crime, as theft, adultery, or murder, he is obliged to ſwim over the river Cranganor, which ſwarms with alligators of a monſtrous ſize. If he reach unhurt the oppoſite bank, he is reputed innocent. If devoured, he is concluded guilty.—*Texeira's Hiſtory of Perſia.*——The trial by fire alſo is diſcovered in a country no leſs remote than Japan.—*Kempfer's Hiſtory of Japan, book* 3. *ch.* 5.

We have evidence of the ſame practice in ancient Greece. In the tragedy of Antigone by Sophocles, there is the following paſſage:

The

* Cap. 7. of his Statutes.

derful, that even the groſſeſt ſuperſtition could ſupport them ſo long. But trial by ſingular battle, introduced by Dagobert king of Burgundy, being more agreeable to the genius of a warlike people, was retained longer in practice. And being conſidered as an appeal to the Almighty, who would infallibly give the cauſe for the innocent, it continued long a ſucceſsful method of detecting guilt; for it was rare to find one ſo hardened in wickedneſs, as to behave with reſolution under the weight of this conviction. But inſtances of ſuch bold impiety, rare indeed at firſt, became more frequent. Men of ſenſe began to entertain doubts about this method of trying cauſes; for why expect a miraculous interpoſition of Providence upon every ſlight diſpute, that may be decided by the ordinary forms of law? Cuſtom, however, and the ſuperſtitious notions of the vulgar, preſerved it long in force; and even after it became a public nuiſance, it was not directly aboliſhed. All that could be done, was to ſap its foundations (6), by

The guards accus'd each other: Nought was prov'd,
But each ſuſpected each; and all denied,
Offering in proof of innocence to graſp
The burning ſteel, to walk through fire, and take
Their ſolemn oath they knew not of the deed.

(6) Among the Longobards, an accuſer could not demand ſingular battle in order to prove the perſon accuſed guilty, till he ſwore upon the goſpel that he had a well-founded

by ſubſtituting gradually in its place another method of trial.

This was the oath of purgation; the form of which is as follows. The defendant brings along with him into court, certain perſons called *Compurgators;* and after ſwearing to his own innocence, and that he brings the compurgators along with him to make and ſwear a leil and true oath, they all of them ſhall ſwear that this oath is true, and not falſe *. Conſidering this form in itſelf, and that it was admitted where the proof was defective on the purſuer's part, nothing appears more repugnant to juſtice. For why ſhould a defendant be ſo loaded, when there is no proof againſt him? But conſidering it with relation to the trial by ſingular battle, to which it was ſubſtituted, it appears to me a rational meaſure. For in effect it was giving an advantage to the defendant which originally he had not, that of chooſing whether he would enter the liſts in a warlike manner, or undergo the oath of purgation. That the oath of purgation came in place of ſingular battle, is not obſcurely inſinuated, Leges Burgor. cap. 24. and

 is

founded ſuſpicion of the perſon's guilt. And it is added, "Quia incerti ſumus de judicio Dei, et multos audivimus "per pugnam ſine juſta cauſa, ſuam cauſam perdere. "Sed propter conſuetudinem gentis noſtrae, Longobar-"dorum legem impiam vetare non poſſumus." *Laws of the Longobards, l. 1. tit. 9. § 23.*

* Quon. Attach. cap. 5. § 7.

is more directly ſaid, Quon. Attach. cap 61. "If a man is challenged for theft in the King's "court, or in any court, it is in his will, whe- "ther he will defend himſelf by battle, or by "the cleanſing of twelve leil men *." It bears in England the law-term of *Wager at Law* †; that is, waging law inſtead of waging battle; joining iſſue upon the oaths of the defendant and compurgators, in place of joining iſſue upon a duel. But the oath of purgation, invented to ſoften this barbarous cuſtom of duels, being reckoned not ſufficient to repreſs the evil, duels were afterwards limited to accuſations for capital crimes, where there are probable ſuſpicions and preſumptions, without direct evidence ‡. And conſequently, if the foregoing conjecture be well founded, the oath of purgation came alſo to be confined to the ſame caſe. By degrees both wore out of uſe; and, in this country, there are no remaining traces of the oath of purgation, if it be not in eccleſiaſtical courts.

It is probable, that as ſingular battle gave place to the oath of purgation, ſo this oath gave place to juries. The tranſition was eaſy, there being no variation, other than that the twelve compurgators, formerly named by the defendant, were now named by the judge. The variation

* See Spelman's Gloſſary, tit. Adrhamire.

† Jacob's Law-Dictionary, *voce* Wager at Law.

‡ Stat. Rob. III. cap. 16.

riation proved notably advantageous to the defendant, though in appearance againſt him. Singular battle wearing out of repute, the injuſtice of burdening with a proof of innocence every perſon who is accuſed, was clearly perceived; and witneſſes being now more frequently employed on the part of the proſecutor to prove guilt, than on the part of the defendant to prove innocence, it was thought proper that they ſhould be choſen by the judge, not by the defendant. If it be demanded, Why not by the proſecutor, as at preſent? it is anſwered, That at that time the innovation would have been reckoned too violent. However this be, one thing appears from Glanvil *, That in all queſtions concerning the property of land, founded on the brieve of right, a privilege was about that time beſtowed on the defendant, to have the cauſe tried by a jury, inſtead of ſingular battle. As this was an innovation authoriſed by reaſon, and not by ſtatute, it was probably at firſt attempted in queſtions upon the brieve of right only; matters of leſs importance being left upon the oath of purgation. That a jury trial, and the oath of purgation, were in uſe both of them at the ſame time, we have evidence from the Regiam Majeſtatem †, compared with the foregoing quotations. But theſe two me-

* L. 2. cap. 7. to the end of that book.

† L. 4. cap. 1. § 13. and cap. 4. § 2.

thods could not long ſubſiſt together. The new method of trial by jury, was ſo evidently preferable, that it would ſoon become univerſal, and be extended to all caſes civil and criminal: In fact, we find it ſo extended as far back as we have any diſtinct records.

From this deduction it appears, that a jury was originally a number of witneſſes choſen by the judge, in order to declare the truth *. And hence the proceſs againſt a jury for perjury and wilful error. This explains alſo why the verdict of a jury is final, even when they are convicted of perjury. Singular battle, from the nature of the thing, was ſo; the oath of purgation, ſubſtituted to ſingular battle, was ſo; and a verdict, ſubſtituted to an oath of purgation, fell of courſe to be ſo. It likewiſe explains the practice of England, that the jury muſt be unanimous in their verdict; for it was required, that the compurgators ſhould be ſo in their oath of purgation. The ſame rule probably obtained in Scotland: But at preſent, and as far back as our records carry us, the verdict is fixed by the votes of the majority.

In later times, the nature and office of a jury were altered. Through the difficulty of procuring twelve proper witneſſes acquainted with the facts, twelve men of ſkill and integrity were choſen, to judge of the evidence produced by the

* See Reg. Maj. l. 1. cap. 12.

the litigants. The cauſe of this alteration may be gueſſed, ſuppoſing only that the preſent ſtrict forms of a jury-trial were at firſt not in uſe. If jurymen, conſidered as witneſſes, differed, or were uncertain about the facts, they would naturally demand extraneous evidence; of which when brought, it belonged to them to judge. It is likely, that for centuries jurymen acted thus both as witneſſes and as judges. They may, it is certain, act ſo at this day; though, for the reaſon above given, they are commonly choſen by rotation, without being regarded in the character of witneſſes. Hence it is, that a jury is now conſidered chiefly as judges of the fact, and ſcarce at all as a body of witneſſes. And this explains why the proceſs for perjury againſt them is laid aſide: This proceſs cannot take place againſt judges, but only againſt witneſſes.

TRACT III.

PROPERTY.

THAT peculiar relation which connects a perſon with a ſubject, ſignified by the term *Property*, is one of the capital objects of law. The privileges founded on this relation, are at preſent extenſive, but were not always ſo. Property originally beſtowed no other privilege, but merely that of uſing or enjoying the ſubject. A privilege eſſential to commerce was afterward introduced, viz. to alien for a valuable conſideration: And at preſent the relation of property is ſo intimate, as to comprehend a power or privilege of making donations to take effect after death, as well as during life. Laws have been made, and deciſions pronounced in every age, conformable to the different ideas that have been entertained of this relation. Theſe laws and deciſions are rendered obſcure, and perhaps ſcarce intelligible, to thoſe who are unacquainted with the hiſtory of property: And therefore we may hope, that this hiſtory will prove equally curious and inſtructive (1).

Man

(1) The term *Property* has three different ſignifications. It ſignifies properly, as above, a peculiar relation betwixt

Man by his nature is fitted for ſociety; and ſociety is fitted for man by its manifold conveniencies. The perfection of human ſociety conſiſts in that juſt degree of union among individuals, which to each reſerves freedom and independency, as far as is conſiſtent with peace and good order. The bonds of ſociety may be too lax; but they may alſo be overſtretched. A ſociety where every man ſhould be bound to dedicate the whole of his induſtry to the common intereſt, would be unnatural and uncomfortable, becauſe deſtructive of liberty and independence. The enjoyment of the goods of fortune in common, would be no leſs unnatural and uncomfortable: There ſubſiſts in man a remarkable propenſity for appropriation; and a communion of goods is not neceſſary to ſociety, though it may be indulged in ſome ſingular caſes. And happy it is for man to be thus conſtituted. Induſtry, in a great meaſure, depends on property; and a much greater bleſſing depends on it, which is the gratification of the moſt dignified natural affections. What place would there be for generoſity, benevolence, or charity, if the goods of fortune were common to all?

betwixt a perſon and certain ſubjects, as land, houſes, moveables, &c.; ſometimes it is made to ſignify the privileges a perſon has with relation to ſuch a ſubject; and ſometimes it ſignifies the ſubject itſelf, conſidered with relation to the perſon. I have not ſcrupled to uſe the term, in theſe different ſenſes, as occaſion offered.

all? Theſe noble principles, being deſtitute of objects and exerciſe, would for ever lie dormant; and what would man be without them? —a very groveling creature; diſtinguiſhable indeed from the brutes, but ſcarce elevated above them. Gratitude and compaſſion might have ſome ſlight exerciſe; but how much greater is the figure they make in a ſtate of divided property? The ſprings and principles of man are adjuſted with admirable wiſdom to his external circumſtances; and theſe in conjunction form one regular conſtitution, harmonious in all its parts.

Hunting and fiſhing were originally the occupations of men, upon which chiefly they depended for food. A beaſt caught in a gin, or a fiſh with a hook, being the purchaſe of art and induſtry, were from the beginning conſidered by all as belonging to the occupant: The appetite that man has for appropriation, vouches this to be true. But the extent of the relation thus created betwixt the hunter and his prey, and the power acquired by the former over the latter in common eſtimation, are queſtions of more intricacy. That this relation implies a power to uſe for ſuſtenance the creature thus taken, and to defend the poſſeſſion againſt every invader, is clear. But ſuppoſing the creature to have been loſt, and without violence to have come into the hands of another; I do not clearly

ſee,

ſee, that the original occupant would have any claim, or that reſtitution would be reckoned the duty of the poſſeſſor. This may be thought ſceptical; for to one who has imbibed the refined principles of law, the conception is familiar of a relation betwixt a man and a ſubject, ſo intimate as not to be diſſolvable without his conſent: But, in the inveſtigation of original laws, nothing is more apt to lead into error, than prepoſſeſſion derived from modern improvements. It appears to me highly probable, that among ſavages, involved in objects of ſenſe, and ſtrangers to abſtract ſpeculation, property, and the rights or moral powers ariſing from it, never are with accuracy diſtinguiſhed from the natural powers that muſt be exerted upon the ſubject to make it profitable to the poſſeſſor. The man who kills and eats, who ſows and reaps, at his own pleaſure, independent of another's will, is naturally deemed proprietor. The groſſeſt ſavages underſtand power without right, of which they are made ſenſible by daily acts of violence: But property without poſſeſſion is a conception too abſtract for a ſavage, or for any perſon who has not ſtudied the principles of law. To this day the vulgar can form no diſtinct conception of property, otherwiſe than by figuring the man in poſſeſſion, and uſing the ſubject without controul. If ſuch at preſent be the vulgar way of thinking, we may reaſonably ſuſ-

pect

pect a ſtill greater obſcurity in the conceptions of a ſavage (2).

Thus originally property was a very precarious right; and would have been of little value, had not Nature provided means for recovering it when poſſeſſion was loſt. Where a man is deprived of his goods by theft or other criminal act, the wrong-doer is in conſcience bound to reſtore. He has indeed acquired the property with the poſſeſſion; but he is bound to repair the injuries done to the former poſſeſſor; and the proper reparation is, to reſtore the ſubject to him.

A *bona fide* purchaſer is in a very different condition, ſuppoſing even the goods purchaſed by him to have been ſtolen: He is not liable for the crime of his author; he did no wrong in purchaſing, and conſequently cannot be ſubjected to reparation. And in this caſe the rule obtains, *Quod potior eſt conditio poſſidentis.* And that anciently this was the rule, may be gathered from traces of it which to this day remain in ſeveral

(2) The eſcheating wreck-goods was probably founded on the imperfect notion of property here ſet forth. Among the Romans, the eſcheating wreck-goods was the practice down till the time of Conſtantine: "Si quando "naufragio navis expulſa fuerit ad littus, vel ſi quando "aliquam terram attigerit, ad dominos pertineat: fiſcus meus ſeſe non interponat. Quod enim jus habet "fiſcus in aliena calamitate, ut de re tam luctuoſa compendium ſectetur."—*L.* 11. *Cod. tit.* 5, *lex.* 1.

ſeveral countries. By the old law of Germany, the proprietor could demand his goods from the perſon to whom he delivered them, in order to be reſtored; becauſe this claim is founded on a contract. But he had no claim againſt any other honeſt poſſeſſor. And Heineccius obſerves *, that this continues to be the law of Lubec, of Hamburg, of Culm in Pruſſia, of Sweden, and even of Holland. Upon the ſame principle, ſtolen goods were confiſcated †. For it was held, that the fiſc is a *bona fide* purchaſer, and cannot be reached by an action of reſtitution or reparation; which indeed muſt be confeſſed to be a very great ſtretch *in favorem fiſci*. And this continued to be the law till it was abrogated by the Emperor Charles V. ‡. Upon the ſame principle the Saxon law is founded, That if a thief ſuffer death, by which the ſtolen goods are confiſcated ‖, his heir is not bound to pay the value (3).

Were

(3) If the reader, neglecting the opinions delivered by writers on the Roman law, form his judgment on facts and circumſtances reported by them, he will, to the foregoing authorities, add the practice of the ancient Romans, which, to the man who loſt his goods by theft, afforded a *condictio furtiva* againſt the thief. This action being merely perſonal, founded on the delinquency of the

* Compend. of the Pandects, part 2. § 86.

† Maevius De jur. Lubec. part 4. tit. 1. § 2.

‡ Conſtit. Crim. 218.

‖ Carpzovius, part 4. conſt. 32. def. 23.

Were we altogether deſtitute of evidence, it would remain probable, however, that in this iſland

the defendant, takes it for granted, that the purſuer had by the theft loſt his property; and accordingly the purpoſe of the action is, to compel the defendant to reſtore the poſſeſſion to the purſuer, and conſequently the property. Afterward, when property was diſtinguiſhed from poſſeſſion, and theft was held not ſufficient to deprive a man of his property, a *rei vindicatio* was given. This being a real action, takes it for granted that the property remains with the purſuer; and accordingly, it concludes only that the poſſeſſion be reſtored to him. After this alteration of the law concerning property, there was evidently no longer occaſion or place for the *condictio furtiva*; becauſe a man who has not loſt his property, cannot demand that it be reſtored to him. And yet the later Roman writers, Juſtinian in particular, not adverting to the alteration, hold, moſt abſurdly, That the *rei vindicatio*, and *condictio furtiva*, are competent, both of them, againſt the thief, and that the purſuer has his choice of either; which is in effect maintaining, that the purſuer is proprietor and not proprietor at the ſame time. —*l.* 7. *pr. De condict. furt.*; *§ ult. Inſtitut. De oblig. quae ex delict.*——Vinnius, in his commentary on Juſtinian's Inſtitutes,—*tit. De action.* § 14.—ſees clearly the inconſiſtency of giving to a proprietor the *condictio furtiva*. His words are, "Quomodo igitur fur qui dominus "non eſt, domino cui ſoli condictionem furtivam com- "petere conſtat, rem dare poterit? Quod ſi hoc im- "poſſibile eſt, abſurdiſſimum videtur quod hic traditur, "furem ſic convenire poſſe, ut dare jubeatur, et do- "minium rei quod non habet transferre in actorem, "eundemque rei petitae dominum. Nodus hic indiſſolu- "bilis eſt," &c. Is it not ſtrange, that an inconſiſtency

ſet

iſland the original notions about property did not widely differ from what prevailed in other countries.

ſet in ſo clear a light, did not lead our author to conclude, that the ſuſtaining a *condictio furtiva* is compleat evidence, that when this action was invented the property was by theft underſtood to be loſt?

We find traces of the ſame way of thinking in other matters. A man who by force or fear was compelled to ſell his ſubject at an undervalue, had no redreſs by the common law of the Romans—[*The reaſon of this is given in the ſecond Tract.*]—It was the Praetor who firſt took upon him to reſtore *in integrum* thoſe who were thus deprived of their property. The action originally was ſtrictly perſonal, being directed againſt the wrong doer only; nor could it be extended againſt a *bona fide* purchaſer, as long as property was held to vaniſh when the poſſeſſion was loſt. For though no man is bound by a covenant which by force or fear he is compelled to make, yet when delivery is made, and the ſubject is acquired by a third party, who purchaſes *bona fide*, an action of reſtitution cannot lie againſt him. The claimant who loſt his property with the poſſeſſion, had not a *rei vindicatio*; and a perſonal action could not lie againſt a purchaſer who had no acceſſion to the wrong. But after the doctrine prevailed, That property can ſubſiſt independent of poſſeſſion, it came naturally to be a ſubject of deliberation, whether in this caſe a *rei vindicatio* might not lie againſt the *bona fide* purchaſer, as well as where a ſubject is robbed or ſtolen. There is fundamentally no difference. For a contract, however formal, is no evidence of conſent where force has been interpoſed; and delivery without conſent transfers not property. In this caſe, however, which had the appearance of ſome intricacy, the Roman Praetor did not venture to ſuſtain a *rei vindicatio*

countries. But luckily we have very ſtrong evidence that they were the ſame; not even excepting the caſe of ſtolen goods. Our act 26. parl. 1661, vouches it to have been the law of Scotland, that when a thief was condemned, his effects, including the ſtolen goods, were confiſcated.

vindicatio in direct terms. But the ſame thing was done under diſguiſe. The connection of property had by this time taken ſuch hold of the mind, as to make it a rule, that a man cannot be deprived of his ſubject by an involuntary ſale, more than by theft or robbery; and to redreſs ſuch wrong, the *actio metus* was, by the perpetual edict, extended even againſt the *bona fide* purchaſer.—*l.* 3. *C. His quae vi metuſque cauſ.*——The *actio metus* being in this caſe made truly a real action, differed in nothing but the name from a *rei vindicatio*; for, from a purchaſer *bona fide*, the ſubject evidently cannot be claimed upon any medium, other than that the claimant is proprietor; and conſequently is entitled to a *rei vindicatio*. Hence, in the Roman law, the *actio metus* is claſſed under a ſpecies denominated *Actiones in rem ſcriptae*, a ſpecies which has puzzled all the commentators, and which none of them have been able to explain. It is the hiſtory of law only that can give us a clear notion of theſe actions. All actions paſs under that name, which, originally perſonal, were, by the augmented vigour of the relation of property, made afterward real.

We alſo diſcover from the Roman law, that other real rights made a progreſs ſimilar to that mentioned concerning property. There was, for example, in the Roman law no real action originally for recovering a pledge, when the creditor by accident or otherwiſe loſt the poſſeſſion. It was the Pretor Servius who gave a real action. —§ 8. *Inſtit. De action; and Vinnius upon that ſection.*

cated. Nor is this law abrogated totally by the ſtatute. The proprietor cannot demand his goods, unleſs he proſecute the thief *uſque ad ſententiam.* Such being the law with regard to ſtolen goods, we cannot doubt, but that a man purchaſing *bona fide* from one not proprietor, was ſecure againſt this claim of property. That ſuch was the practice, may be gathered from many paſſages in our ancient law-books, and from the following fact. A regulation appears to have been early introduced, prohibiting buying and ſelling except in open market. The purpoſe undoubtedly was, to repreſs theft, and to prevent the transference of property by private bargains. It is not ſafe to venture ſtolen goods in open market; and if they be diſpoſed of privately, the buyer cannot be ſecure who purchaſes *prohibente lege* (4). I have another fact

(4) Coke—*Inſtit.* 2, *p.* 713.——ſeems not to have underſtood this matter, when he can find no cauſe for the regulation, other than the encouragement of fairs and markets, in order to promote commerce. This implies, that formerly a purchaſe, even in open market, afforded no ſecurity againſt the proprietor; and that the legiſlature for encouraging fairs and markets could think of no better expedient, than to render property precarious, and to ſubject individuals to frequent forfeitures. A meaſure ſo unjuſt and ſo violent is not agreeable to the genius of the law of England. This regulation was introduced to ſecure property, not to unhinge it: which alſo appears from

fact to urge, which is no ſlight confirmation of what is here ſuggeſted. By the oldeſt law of the Romans, a ſingle year completed the preſcription of moveables; which teſtifies, that property independent of poſſeſſion was conſidered to be a right of the ſlendereſt kind. In later times, when the relation of property was ſo ſtrengthened as to be clearly diſtinguiſhed from poſſeſſion, this preſcription was extended to ten years; and with us a man, by preſcription, is not deprived of the moſt trifling moveable in a ſhorter time than forty years.

But if ſuch originally was the law of property, by what over-ruling principle has property acquired ſtrength and energy to follow the ſubject where-ever found, and to exclude even an honeſt purchaſer, where the title of his author is diſcovered to be lame? This queſtion enters deep into the hiſtory of law; and the anſwer to it muſt be drawn, partly from natural, partly from political principles. It will appear in the courſe of this hiſtory, that both have concurred to beſtow

from the two ſtatutes mentioned by our author, confining the privilege of thoſe who purchaſe in open market within the narroweſt bounds. By the latter, viz. 31ſt of Eliſabeth, no perſon is in ſafety to buy a horſe, even in open market, unleſs ſome ſufficient or credible perſon vouch for the vender. And even in that caſe, the horſe muſt be reſtored to the proprietor claiming within ſix months, and offering the price that was paid by the *bona fide* purchaſer.

ſtow upon property that degree of firmneſs and ſtability which at preſent it enjoys among all civilized nations. Proceeding regularly, according to the courſe of time, the firſt cauſe which offers itſelf to view is a natural principle.

Man, by the frame of his body, is unqualified to be an animal of prey. His ſtomach requires more regular ſupplies of food, than can be obtained in a ſtate where food is ſo precarious (5).

(5) When men were hunters, and lived like carnivorous animals upon prey, there could be no regular ſupplies of food; and after they became ſhepherds, the former habit of abſtinence made their meals probably leſs frequent than at preſent, though food was at hand. In old times, there was but one meal a-day; which continued to be the faſhion, even after great luxury was indulged in other reſpects. In the war which Xerxes made upon Greece, it was pleaſantly ſaid of the Abderites, who were appointed to provide for the King's table, that they ought to go in general proceſſion and acknowledge the favour of the gods, in not inclining Xerxes to eat twice a-day.—*Herodotus, l.* 7.——In the reign of Henry VI. of England, we have Shakeſpeare's authority, that the people of England fed but twice a-day.—*Vol.* 5. p. 95. *near the top, compared with p.* 93. *in the middle. Warburton's edition.*——Our hiſtorian Hector Boyes exclaims againſt the growing luxury of his time, that, not ſatisfied with two meals, ſome men were ſo gluttonous as to eat thrice every day. Cuſtom, no doubt, has a powerful effect in this caſe, as well as in many others: but the human frame is not ſo much under the power of cuſtom, as to make it eaſy for a man, like an eagle, to faſt perhaps a month.

His neceſſities taught him the art of taming ſuch of the wild creatures as are peaceable and docile. Large herds were propagated of horned cattle, ſheep, and goats; which afforded plenty of food ready at hand for daily uſe. By this invention, the conveniencies of living were greatly promoted: and in this ſtate, which makes the ſecond ſtage of the ſocial life, the relation of property, though not entirely disjoined from poſſeſſion, was conſiderably enlivened. The care and attention beſtowed upon a domeſtic animal from the time of its birth, form in the mind of every one a ſtrong connection betwixt the man and his beaſt, which, upon any caſual interruption of poſſeſſion, does not ſo readily vaniſh, as in the caſe of a wild beaſt ſeized by a hunter.

Thus, by a natural principle, the relation of property was in ſome meaſure fortified, and was conſidered as forming a ſtricter connection betwixt man and other animals than it did originally. In this condition, a political principle contributed to make the relation appear ſtill more intimate. Experience demonſtrated, that it is impracticable to repreſs theft and robbery, if purchaſers be ſecure on the pretext of *bona fides*. For every purchaſe muſt be preſumed honeſt, till the contrary be proved; and nothing is more eaſy than to contrive a diſhoneſt purchaſe that ſhall be ſecure from detection. To

remedy

remedy an evil which gave ſo great ſcope to ſtealth and violence, the regulation above mentioned was introduced, prohibiting all buying and ſelling except in open market. After this regulation, a private purchaſe afforded no ſecurity, nor was the property transferred. The *nexus*, or lien, of property was greatly ſtrengthened, when it was now become law, that no man could be deprived of his property without his own conſent; except ſingly in the caſe of a purchaſe *bona fide* in open market. I add upon this head, that the notion of right, independent of natural power, once unfolded, acquired the greateſt firmneſs and ſtability, by the regular eſtabliſhment of courts of juſtice, the great purpoſe of which is, to afford natural power whenever it is of uſe to make right or moral power effectual.

The influence of property in its different ſtages of improvement, is remarkable. The *nexus*, or lien, of property being originally ſlight, it was not thought unjuſt to deprive a man of his property by means of a *bona fide* purchaſe, even where the ſubject was ſold by a robber. The law that reſtrained purchaſes except in open market, beſtowed a firmneſs on the relation of property, which made it in ſome meaſure prevail over the right of a *bona fide* purchaſe. This produced the ſtatute above mentioned, 31ſt of Elizabeth, enacting, that

even a *bona fide* purchaſe in open market ſhall not transfer the property, provided the proprietor claim within ſix months, and offer to the purchaſer the price he paid. So ſtands the law of England to this day; and yet to ſuch ſtability has the relation of property arrived in courſe of time, by the favour of all men, that it is doubtful, whether at preſent the claim of property would not be ſuſtained, even without offering the price. In Scotland, there is a regulation of a very old date, for the ſecurity of property. Beſide buying in open market, the purchaſer is bound to take from the vender ſecurity for his honeſty, termed *Borgh of haimhald*. By this precaution the purchaſer was ſecure againſt all the world. But if the goods came to be claimed by the true owner, the cautioner was bound to produce the vender, otherwiſe to be liable for damages *. But though this continues to be our ſtatute-law, ſuch however is the influence of property, that I doubt whether our judges would not be in hazard of ſuſtaining a *rei vindicatio* againſt the purchaſer in open market, even after uſing the foregoing precaution. Property, it is certain, is a great favourite of human nature, and is frequently the object of a very ſtrong affection. In the fluctuating ſtate of human affairs before regular governments were formed, property was ſeldom ſo

* Leg. Burg. cap. 128.

ſo permanent as to afford great ſcope for this affection. But in peaceable times, under a ſteady adminiſtration of law, the affection for property becomes exceeding warm; which fortifies greatly the relation of property. Thus there is diſcovered a natural reſemblance between government and property: from the weak and infantine ſtate in which both are found originally, they have equally arrived at that ſtability and perfection which they enjoy at preſent.

Having advanced ſo far in the hiſtory of moveable property, it is time to turn our view to the property of land. In the two firſt ſtages of the ſocial life, while men were hunters or ſhepherds, there ſcarce could be any notion of land-property. Strangers to agriculture, and to the art of building, if it was not of huts which could be raiſed or demoliſhed in a moment, men had no fixed habitation, but wandered about in hords, to find paſture for their cattle (6). In this vagrant life, men had ſcarce any connection with land more than with air or water. A field of graſs might be conſidered as belonging to a hord or clan, while they were in poſſeſſion;

(6) The Scythians drawing no ſubſiſtence from the plough, but from cattle, and having no cities nor incloſed places, made their carts ſerve them for houſes: by which it was eaſy for them to move from place to place. Herodotus, *book* 4. from this obſerves, that the Scythians are never to be found by an enemy they chuſe to avoid.

and ſo might the air which they breathed, and the water which they drank: but the moment they removed to another quarter, there no longer ſubſiſted any connection betwixt them and the field that was deſerted. It lay open to new-comers, who had the ſame right as if it had not been formerly occupied. Hence I conclude, that while men were ſhepherds, there was no relation formed betwixt them and land, in any manner ſo diſtinct as to obtain the name of property *.

Agriculture, which makes the third ſtage of the ſocial life, produced the relation of land-property. A man who has beſtowed labour in preparing a field for the plough, and who has improved that field by artful culture, forms in his mind an intimate connection with it. He contracts by degrees a ſingular affection for a ſpot, which in a manner is the workmanſhip of his own hands. He is fond to live there, and there to depoſit his bones. It is an object that fills his mind, and is never out of thought at home or abroad. After a ſummer's expedition, or perhaps years of a foreign war, he returns with avidity to his own houſe, and to his own field, there to paſs his time in eaſe and plenty. By ſuch trials, the relation of property is diſjoined from poſſeſſion; and to this disjunction, the

* See the deſcription given by Thucydides of the original ſtate of Greece, book 1. at the beginning.

the lively perception of property with reſpect to an object ſo conſiderable, mainly contributes. If a proprietor happen to be diſpoſſeſſed in his abſence, the injuſtice is perceived and acknowledged. In the common ſenſe of mankind, he continues proprietor, and a *rei vindicatio* will be ſuſtained to him againſt the poſſeſſor, to whom the property cannot be transferred by an immoral act. But what if the ſubject, after a long interval, be purchaſed *bona fide*, and peaceable poſſeſſion attained? I have given my reaſons above for conjecturing, that in ancient times ſuch a purchaſe transferred property, and extinguiſhed the right of the former proprietor. Such undoubtedly was once the condition of moveable property, gradually altered, as obſerved above, by ſucceſſive regulations. Land-property continued a much ſhorter time in this unſtable condition. Of all ſubjects of property, land is that which engages our affection the moſt; by which means the relation of land-property grew up much ſooner to its preſent firmneſs and ſtability, than the relation of moveable property. For many centuries paſt, it is believed, that in no civilized nation has *bona fides* alone been held to ſecure the purchaſer of land. Where the vender is not proprietor, it is requiſite that the purchaſe be followed with a long and peaceable poſſeſſion.

It is highly probable, that the ſtrong *nexus* of land-property, which cannot be looſed otherwiſe than by conſent, had an influence upon moveable property, to make it equally ſtable. But if land-property led the way in this particular, moveable property undoubtedly led the way in what we are now to enter upon, viz. the power of aliening. The connection of perſons with moveables is more immediate than with land. A moveable may be locked up in a repoſitory: Cattle are killed every day for the ſuſtenance of the proprietor and his family. From this power, the tranſition is eaſy to that of alienation; for what doubt can there be of my power to alien what I can deſtroy? The right or power of alienation muſt therefore have been early recogniſed as a quality of moveable property. The power of diſpoſing moveables by will, to take effect after death, is a greater ſtretch; and we ſhall have occaſion to ſee, that this power was not early acknowledged as one of the qualities even of moveable property. We have reaſon beforehand to conjecture, that a power of aliening land, whether to take effect inſtantly or after death, was not early introduced; becauſe land admits not, like moveables, a ready delivery from hand to hand. And this conjecture will be verified in the following part of our hiſtory. Land, at the ſame time, is a deſirable object; and a power to alien, after it came to be eſta-

bliſhed in moveable property, could not long be ſeparated from the property of land.

But before we proceed farther in this hiſtory, we muſt take a view of the forms and ſolemnities that in the common apprehenſion of mankind are requiſite, firſt to acquire, and then to transfer land-property. For theſe, if I miſtake not, will ſupport the foregoing obſervations. It is taught by all writers, that occupation is an eſſential ſolemnity in the original eſtabliſhment of land property. The reaſon will be evident from what is ſaid above, that property originally was not ſeparated from poſſeſſion. And the ſame ſolemnity is requiſite at this day with reſpect to every uninhabited country: For where there is no proprietor to alien, there can be no means other than occupation to form the connection of property, whether with land or with moveables. Occupation was equally neceſſary in old times to compleat the transference of land-property; for if property was thought not to have an exiſtence without poſſeſſion, occupation was neceſſary for transferring the property of land, as well as for eſtabliſhing it originally. But when property came to be conſidered as a right independent of poſſeſſion, it was natural to relax from the ſolemnities formerly requiſite in the transference of land-property. It is often difficult, and always troubleſome, to introduce a purchaſer with his family and goods into the natural

natural poſſeſſion; and this ſolemnity was diſpenſed with, becauſe not eſſential upon the later ſyſtem of property. But then, in oppoſition to a practice ſo long eſtabliſhed, the innovation would have been too violent, to transfer property by the bare will of the former proprietor, without any ſolemnity in place of poſſeſſion. Such is our attachment to viſible objects, that it would have appeared like magic, or the tricks of a juggler, to make the property of land jump from one perſon to another, merely upon pronouncing certain words expreſſing will or conſent. Words are often ambiguous, and always too tranſitory to take faſt hold of the mind, without concomitant circumſtances. In place, therefore, of actual poſſeſſion, ſome ouvert act was held neceſſary in order to compleat the tranſmiſſion. This act, whatever it be, is conceived as repreſenting poſſeſſion, or as a ſymbol of it; and hence it has acquired the name of ſymbolical poſſeſſion. When this form firſt crept in, ſome act was choſen to repreſent poſſeſſion as near as poſſible; witneſs the caſe mentioned by Selden *, where a grant of land made to the church *anno* 687, was perfected by laying a turf of the land upon the alter. This innovation was attempted with the greateſt caution; but after the form became cuſtomary, there was leſs nicety in the choice. The delivery of a ſpear,

* Janus Anglorum, cap. 25.

ſpear, of a helmet, or of a bunch of arrows, completed the tranſmiſſion. In ſhort, any ſymbol was taken, however little connected with the land: It was ſufficient that it was connected with the will of the granter. In the cathedral of York, there is to this day preſerved, a horn delivered by Ulphus King of Deira to the monaſtery of York, as a ſymbol for completing a grant of land in their favour (7).

A ſingle obſervation, with which I ſhall conclude this branch of the ſubject, may ſerve to give a more enlarged view of it. There is a ſtricter analogy betwixt creating a perſonal obligation and transferring land property, than is commonly imagined. Words merely make no great impreſſion upon the rude and illiterate. In ancient times, therefore, ſome external ſolemnity was always uſed to fortify covenants and engagements, without which they were reckoned not binding *. As writing at preſent is common, and the meaning of words aſcertained, we require

(7) It is a common practice among the ſalmon-fiſhers to purloin from their maſters part of the fiſh; and it is very difficult to reſtrain them, becauſe they ſcaree think it a fault. They cannot conceive, that a ſalmon before delivery belongs to their maſter. After delivery, indeed, or after the maſter's mark is put upon the fiſh, they readily admit, that it would be theft to take any away. This ſhows, that in the natural ſenſe of mankind, occupation or delivery is requiſite to eſtabliſh property.

* See the eſſay immediately foregoing.

require no other ſolemnity but writ, to compleat the moſt important tranſactions. Writ hitherto, with regard to land-rights, has not in Scotland ſuperſeded the uſe of ſymbolical delivery: But when our notions ſhall be more refined, and ſubſtance regarded more than form, it is probable, that external ſymbols, which have long been laid aſide in perſonal rights, will alſo be laid aſide in rights affecting land. We return to our hiſtory.

Property, which originally beſtowed no power of alienation, carries the mind naturally to the children of the poſſeſſor, who continue the poſſeſſion after his death, and who muſt ſucceed if he cannot alien (8). Their right, being independent of his will, was conceived a ſort of property. They make part of the family, live upon the land, and, in common with their parents, enjoy its product. When the father dies, they continue in poſſeſſion without any alteration, but that the family is leſs by one than formerly. Such a right in children, which commenced at their birth, and which was perfected by the father's death, was not readily to be diſtinguiſhed from property. It is in effect the ſame with the ſtricteſt entail that can be contrived.

To thoſe who are ignorant of the hiſtory of law, and are rivetted to the preſent ſyſtem of things,

(8) Heredes tamen ſucceſſoreſque ſui cuique liberi: Et nullum teſtamentum. *Tacitus de moribus Germanorum.*

things, the right here attributed to children may appear chimerical. But it will have a very different aſpect, after mentioning a few of the many ancient cuſtoms and regulations founded upon it. And, to pave the way, I ſhall firſt ſhow, that the notions of the ancients were preciſely as here ſtated; for which I appeal to a learned Roman lawyer, Paulus *. "In ſuis heredibus evidentius apparet, continuationem dominii eo rem perducere ut nulla videatur hereditas fuiſſe; quaſi olim hi domini eſſent, qui etiam vivo patre quodammodo domini exiſtimantur. Unde etiam filius-familias appellatur, ſicut paterfamilias: Sola nota hac adjecta, per quam diſtinguitur genitor ab eo qui genitus ſit. Itaque poſt mortem patris non hereditatem percipere videntur, ſed magis liberam bonorum adminiſtrationem conſequuntur." Here we ſee, even in an author far removed from the infancy of law, the intereſt which children once had in the eſtate of their father, termed a ſort of property. The only thing ſurpriſing in this paſſage is, that a notion ſo diſtinct ſhould remain of the property of children in their father's effects, for ſuch a length of time after the right was at an end. But to proceed, it plainly aroſe from this right, that among the Romans children got the appellation of *ſui et neceſſarii heredes*. The ſtrict connection betwixt parents and

* L. 11. De liber. et poſthum. hered.

and children produced the firſt term; and the other aroſe from the ſingularity of their condition, that the heritage becoming theirs *ipſo facto* by the father's death, they were heirs neceſſarily, without liberty of choice. Nor did this ſubject them to any riſk; becauſe, deriving no right from their father, they were not bound to fulfil his deeds. In general, while property ſubſiſted without power of aliening, no deed done by the father, whether civil or criminal, could affect the children. And as to crimes, ſome good authorities are ſtill extant. It was a law of Edward the Confeſſor, That children born or begot before commiſſion of a crime that infers forfeiture of goods, ſhall not loſe their inheritance *. And it was a law of the Longobards †, That goods are not confiſcated where the criminal has near relations. Other regulations, acknowledging this right in children, and authoriſing particular exceptions from it, will come in more properly after proceeding a little farther in our hiſtory.

It is remarked above, that the enlarged notion of property, by annexing to it a power of alienation, obtained firſt in moveables: And indeed ſociety could ſcarce ſubſiſt without ſuch a power; at leaſt as far as is neceſſary for exchanging commodities, and carrying on commerce.

* Lambard's collection of old Engliſh laws, Edw. the Confeſſor, l. 19. at the end. † L. 1. tit. 10. § 1.

merce. But the ſame power was not early annexed to the property of land; unleſs perhaps to ſupport the alienation of ſome ſmall part for value. This we know, that a proprietor of land that had deſcended to him from his anceſtors, could not diſpoſe of it totally, even for a valuable conſideration, unleſs he was reduced to want of bread; and even in that caſe he was obliged to make the firſt offer to his heir. This regulation, known among lawyers by the name of *jus retractus*, is very ancient; and we have reaſon to believe it was univerſal. It obtained among the Jews *. It was the law of Scotland †, of which we have traces remaining not above three centuries ago ‡. And it appears alſo to have been the law among other European nations ‖. But this regulation gave place gradually to commerce; and, now for ages, bargains about land have been no leſs free than bargains about moveables. The power of aliening for a valuable conſideration, is now univerſally held to be inherent in the property of land as well as of moveables.

Donations, or gratuitous alienations, were of a ſlower growth. Theſe were at firſt ſmall, and

* Ruth, iv.

† Leg. Burg. cap. 45. 94. 95. 96. 115. 125. § 7. 127.

‡ See Appendix, No 2.

‖ Laws of the Saxons, § 14. 16.

and upon plauſible pretexts. By degrees they gained ground, and in courſe of time came to be indulged almoſt without limitation. By the laws of the Viſigoths *, it was lawful to make donations to the church. The Burgundians ſuſtained a gift by a man though he had children †. And among the Bavarians, it was lawful for a free man, after dividing his means with his ſons, to make a donation to the church out of his own portion ‡. With reſpect to our Saxon anceſtors, the learned antiquary Sir Henry Spelman is an excellent guide. He obſerves ‖, "That heritable land began by little and little "to be aliened by proprietors, firſt to churches "and religious houſes by conſent of the next "heir; next to lay perſons; ſo that it grew at "laſt a matter of courſe for children, as *heredes* "*proximi*, for kinſmen, as *heredes remotiores*, and "for the lord, as *heres ultimus*, to confirm the "ſame. Such conſent being underſtood a mat-"ter of courſe, it grew to be law, That the fa-"ther, without conſent of his heirs, might give "part of his land, either to religious uſes, or "in marriage with his daughter, or in recom-"pence of ſervice." That ſuch was the practice of England in the days of Henry II. Glanvil

* L. 5 tit. 1. § 1.

† Laws of the Burgundians, tit. 1.

‡ Laws of the Bavar. tit. 1. § 1.

‖ Of ancient deeds and charters, p. 234.

vil teſtifieth *. And that ſuch alſo was the law of Scotland in the days of David II. is teſtified by Reg. Maj. †. But here a limitation mentioned by both authors muſt be attended to, That ſuch a donation was not effectual unleſs completed by delivery. The reaſon aſſigned is ſlight and unſatisfactory; but the true reaſon is, that if the ſubject was not delivered, the heir, whether we conſider the feudal or allodial law, was entitled to take poſſeſſion after his anceſtor's death, without being ſubjected to pay any of the debts, or perform any of the engagements of his anceſtor. And upon that account, there was no ſecurity againſt the heir, but by delivery. This alſo appears to have been the Roman law ‡.

Donations *inter vivos*, paved the way to donations *mortis cauſa*. But this was a wide ſtep that required the authority of a law; for it was hard to conceive that the will of any man ſhould, after his death, and after his own right was at an end, have ſo ſtrong an effect, as to prefer any perſon before the lawful heir. The power of teſting was introduced among the Athenians by a law of Solon, giving power to every proprietor who had no children, to regulate his ſucceſſion by teſtament. Plutarch, in the life of that lawgiver, has the following paſſage. "Magnam quoque ſibi exiſtimationem peperit

* L. 7. cap. 1. † L. 2. cap. 18.

‡ Heineccii Antiquitates Romanae, l. 2. tit. 7. § 13.

" lege de teſtamentis lata. Antea enim non " licebat teſtamentum condere; nam defuncti " opes domumque penes genere proximos ma- " nere oportebat. Hic liberum fecit, ſi liberi " non eſſent, res ſuas cui vellet dare: praetu- " litque amicitiam generi, et gratiam neceſſita- " ti: et effecit, ut pecuniae poſſeſſorum pro- " priae eſſent." The concluding ſentence is remarkable. Alienations *inter vivos* had been long in practice; and it was but one ſtep farther to annex to property a power of alienating *mortis cauſa*. Athens was ripe for this law; and hence it was natural for Plutarch to obſerve, that the power of teſting made every man proprietor of his own goods. The Decemviri at Rome transferred this law into their Twelve Tables, in the following words, *Pater-familias uti legaſſit ſuper familiae, pecuniae, tutelaeve ſuae rei, ita jus eſto.* This law, though conceived in words unlimited, was certainly not intended, more than Solon's law, to deprive children of their birthright, which, in that early period, was too firmly eſtabliſhed to be ſubjected to the arbitrary will of the father; and if their intereſt in the ſucceſſion had not been greater than that of other heirs, they would not have deen diſtinguiſhed by the appellation of *ſui et neceſſarii heredes*. Further, that among the Romans the power of teſting did not originally affect the heirs of the teſtator's own body, muſt be evi-

dent

dent from the following circumſtance, that even after the law of the Twelve Tables, no man had a power to exheredate his own iſſue, unleſs in the teſtament he could ſpecify a juſt cauſe, ingratitude, for example, rendering them unworthy of the ſucceſſion. And the *querela inofficioſi teſtamenti* was an action introduced in favour of children, for reſcinding teſtaments made in their prejudice, in which no cauſe of exheredation was aſſigned, or an unjuſt cauſe aſſigned. It is true, that a man afterward was indulged to diſinherit his children without a cauſe, provided he bequeathed to them the fourth part of what they would have inherited *ab inteſtato* *. But Juſtinian † reſtored the old law, declaring, that without a juſt cauſe of exheredation ſpecified in the teſtament, the *querela* ſhall be competent, notwithſtanding his leaving the ſaid fourth part to his ſon and heir. And this regulation was adopted by the Longobards ‡.

But though the *ſui et neceſſarii heredes* could not be directly exheredated, it was in the father's power not only by alienations *inter vivos*, but even by contracting debt, to render the ſucceſſion unprofitable. As ſoon as the power of aliening becomes a branch of property, every ſubject belonging to a debtor, land or moveables, muſt lie open to be attached by his creditors.

* L. 8. § 6. De inoff teſt. † Novel. 115. cap. 3.
‡ L. 2. tit. 14. § 12.

ditors. It is his duty to convert into money the readieſt of his ſubjects for their payment; and if he prove refractory, by refuſing to do what in conſcience is incumbent upon him, the law will interpoſe. Juſtice beſtows this privilege upon creditors during their debtor's life; and conſequently alſo after his death; it being inconſiſtent with juſtice that the heir ſhould profit by their loſs. This new circumſtance introduced neceſſarily an alteration of the law as to the *ſui et neceſſarii heredes*: for now they could no longer be held as neceſſary heirs, when their being heirs was no longer attended with ſafety, but might prove ruinous inſtead of beneficial. The ſame rule of juſtice which prevailed in the former caſe, prevailed alſo in this, and conferred upon them the privilege of abandoning the ſucceſſion, in which caſe their father's debts did not reach them *.

It may appear ſingular, that while children were thus gradually loſing ground, collateral heirs, who originally had no privilege, were in many countries gaining ground. I ſhall firſt ſtate the facts, and afterward endeavour to aſſign the cauſe. Several nations followed the Grecian plan, indulging an unlimited power of teſting, where the teſtator had not iſſue of his own body. Thus, by the Ripuarian law, a man who had no children might diſpoſe of his effects as

* L. 12. De acquir. vel omit. hered.

as he thought proper *; and, among the Viſigoths, the man who had no deſcendants might do the ſame †. But this privilege was more limited among other nations. The power of making a teſtament, beſtowed at large by the Roman law failing children, was afterward confined within narrower bounds. The privilege of children and other deſcendants to reſcind a teſtament exheredating them without juſt cauſe, ſpread itſelf upon other near relations; and theſe therefore might inſiſt in a *querela inofficioſi*, which originally was competent to deſcendants only ‡. By the laws of the German Saxons, it was not lawful to diſinherit the heir ‖. And by the laws of King Alfred, "He who inherits "lands derived from his anceſtors by writ, "ſhall not have power to alien the ſame from "his heirs, eſpecially if it be proved by writing "or witneſſes, that the perſon who made the "grant diſcharged ſuch alienation §." Thus we ſee in ſeveral inſtances, the prerogative of a child who is heir, extended in part to other heirs, which, as hinted above, may appear ſurpriſing, when the powers of the proprietor in poſſeſſion over his ſubject were by this time enlarged, and the right of his children abridged in proportion.

* Lex Ripuariorum, § 48.
† Lex Viſigothorum, l. 4. tit. 2. § 20.
‡ L. 1. De inoff. teſt. ‖ Laws of the Saxons, § 14.
§ Lambard's Collection. Laws of King Alfred, l. 37.

To ſet this matter in its proper light, I muſt premiſe, that originally there was not ſuch a thing as a right of ſucceſſion, in the ſenſe we now give to that term. Children came in place of their parents: But this was not properly a ſucceſſion; it was a continuation of poſſeſſion, founded upon their own title of property. And while the relation of property continued ſo ſlight as it was originally, it was perhaps thought ſufficient that children *in familia* only ſhould enjoy this privilege. Hence when a man died without children, the land he poſſeſſed fell back to the common, ready for the firſt occupant. But the connection betwixt a man and the land upon which he dwells, having in courſe of time acquired great ſtability, is now imagined to ſubſiſt even after death. This conception preſerves the ſubject as in a ſtate of appropriation; and conſequently bars every perſon except thoſe who derive right from the deceaſed. By this means, the right of inheriting the family eſtate was probably communicated firſt to children *foriſfamiliate*, eſpecially if all the children were in that ſituation; afterward, failing children, to brothers, and ſo gradually to more diſtant relations. We have to this day traces remaining of the gradual progreſs. In the laws of the Longobards, collaterals ſucceeded to the ſeventh degree *. Our countryman Craig † relates it as the

* L. 2. tit. 14. § 1. † L. 2. dieg. 17.

the opinion of ſome, that if there be no heirs within the ſeventh degree, the king hath right as *ultimus heres*. He indeed ſignifies his own opinion to the contrary; and now it is eſtabliſhed, That relations ſucceed, however diſtant.

The ſucceſſion of collaterals, failing deſcendants, produced a new legal idea; for as they had no pretext of right independent of the former proprietor, their privilege of ſucceeding could ſtand upon no ground but the preſumed will of the deceaſed, which made them heirs in the proper ſenſe of the word, ſucceeding to the right of the deceaſed, and enjoying his land by his will. This makes a ſolid difference betwixt the ſucceſſion of collaterals, depending on the will of the anceſtor, and the ſucceſſion of deſcendants, which originally did not depend on his will. But the privilege of deſcendants being gradually reſtrained within narrower and narrower bounds, was confounded with the hope of ſucceſſion in collaterals. They were put upon the ſame footing, and conſidered equally as repreſentatives of the perſon in whoſe place they came. This deduction appears natural; and what I have farther to obſerve appears no leſs ſo, That deſcendants and collaterals being thus blended into one claſs, the privileges of the former were communicated to the latter.

But the privileges thus acquired by collaterals, were not of long continuance. The powers annexed

annexed to property being carried to their utmoſt bounds, it came, in moſt countries which did not adhere to the Roman law, to be conſidered as an inherent power in proprietors, to ſettle their eſtates at their pleaſure, without regard to their natural heirs, deſcendants or collaterals. In this iſland the power of diſpoſal became unlimited, even to take effect after death, provided the deed were in the form of an alienation *inter vivos*. The property which children once had in the family eſtate was no longer in force, except as to one particular, that of barring deeds on deathbed (9). And this, with other privileges of deſcendants, was communicated

(9) While the law ſtood as originally, That no man could diſpoſe of his eſtate in prejudice of his heir, there could not be place for the law of deathbed. This law was a conſequence from indulging proprietors to diſpoſe of a part for rational conſiderations; from which indulgence deathbed was an exception. Hence it appears, that the law of deathbed was not a new regulation introduced into Scotland by ſtatute or cuſtom. It is in reality a branch of the original law, reſtricting proprietors from aliening their lands in prejudice of their heirs, which original law is ſtill preſerved entire in the circumſtance of deathbed. Our authors have not been lucky in gueſſing, when they aſcribe the law of deathbed to the wiſdom of our forefathers, in order to protect their eſtates from the rapacity of the clergy. It exiſted too early among us to make this a probable ſuppoſition. In thoſe early times, the prevalence of ſuperſtition would have prevented ſuch a regulation, had it been neceſſary.

communicated to collateral heirs *. In England, the powers of proprietors were ſo far extended by a law of Henry VIII. †, as to entitle them, without the formality of a deed of alienation, to ſettle or diſpoſe of their lands by teſtament; after which, deeds on deathbed could no longer be reſtrained. In Scotland, the law of deathbed ſubſiſts entire, as well as the limitation upon proprietors, that they cannot diſpoſe of their heritable ſubjects by teſtament. The former is not now conſidered as a limitation of the powers of property, but as a perſonal privilege belonging to heirs: For which reaſon, a deed on deathbed is not void for want of power: It is an effectual grant till it be voided by the heir upon his privilege. But the latter is plainly a limitation of the powers of property; which ſhews, that in this country property is more limited than in England. By the old law, a donation had no effect without delivery: For ſuppoſing the deed to have contained warrandice, yet this warrandice was not effectual againſt the heir, who was not bound to pay his father's debts, or fulfil his engagements. Heirs, it is true, are now liable: But then a teſtament contains no warrandice; and therefore an heritable ſubject legated by teſtament is conſidered, as of old, an incompleat donation, which the heir is not

* See Glanvil, l. 7. cap. 1.; Reg. Maj. l. 2. cap. 18.
† 34. and 35. Henry VIII. cap. 5. § 4.

not bound to make effectual. But though we admit not of the alienation of an heritable ſubject by teſtament, alienation is ſuſtained in a form very little different. A diſpoſition of land, though a mere donation, implies warrandice; and therefore ſuch a deed, after the granter's death, ſuppoſing it to contain neither procuratory nor precept, will be effectual againſt his heir. And the difference betwixt this deed and a teſtament in point of form, is ſo ſlight, that it is not to be underſtood, except by thoſe who are daily converſant in the forms and ſolemnities of law.

Children by the law of Scotland enjoy another privilege, which is, a certain portion of the father's moveable eſtate. Of this he cannot deprive them by will, nor by any deed which does not bind himſelf. This privilege, like that of deathbed, is obviouſly a branch of the original law; being founded upon the nature of property as originally limited. The power over land is in Scotland not ſo far extended, as that an incompleat donation will be effectual againſt the heir, when executed in the form of a teſtament. The power over moveables is ſo far extended, as that they can be gifted by teſtament; but yet not ſo as to affect the intereſt which the children have in the moveables. And there is the following analogy between the heir's title to heritage, and that of children to moveables, that both

both have been converted from rights of property to perſonal privileges; with this difference only, that the privilege of a child, heir in the land eſtate, to bar the father's deathbed-deed, is communicated to other heirs; whereas the priviiege of children, reſpecting the moveable eſtate, is communicated to deſcendants only, and not to collaterals.

As a moveable ſubject is more under the natural power of man than land, ſo the legal powers of moveable property were brought to perfection more early than of land-property. It may therefore appear whimſical, that the power of aliening moveables ſhould be more limited than that of aliening land. The latter may be aliened from the heir by a deed to take effect after the granter's death: The former cannot be ſo aliened from the children. Were I to indulge a conjecture in order to account for this branch of our law, it would be what follows. The privilege of children reſpecting the moveable eſtate was preſerved entire, becauſe it was all along confined to children; but their privilege reſpecting the real eſtate having been communicated to collaterals, which put all heirs upon the ſame level, the character of child was loſt in that of heir, and their common privileges ſunk together. Thus, though collaterals have profited by being blended in

in one claſs with deſcendants, the latter have been loſers by the union.

After ſo much diſcourſe upon a ſubject that is ſubtile and perhaps dry, it will, I preſume, be agreeable to the reader, before entering upon the ſecond part, to unbend his mind for a few moments, upon ſome epiſodical matters that tend to illuſtrate the foregoing doctrine. The firſt ſhall be the equal diviſion of land-property effectuated in Sparta by Lycurgus. One whoſe notions are derived from the preſent condition of land property, muſt be extremely puzzled about this memorable event; for where is the man to be found, who will peaceably ſurrender his land to the public without a valuable conſideration? And if ſuch a man could be found for a wonder, it would be downright frenzy to expect the ſame from a whole people: Yet in ſettling this branch of public police, ſo ſingular in its nature, we read not even of the ſlighteſt tumult or commotion. The ſtory always appeared to me incredible, till I fell upon the train of thinking above mentioned. In ancient times, property of land was certainly not ſo valuable a right as at preſent: It was no better than a right of uſufruct, a power of uſing the fruits for the ſupport of the poſſeſſor and his family. At the ſame time, the manner of living anciently was more ſimple than at preſent: Men were ſatisfied with the product of the land they poſ-

ſeſſed,

ſeſſed, for their food and raiment. When the foregoing revolution was brought about in Sparta, it is probable, that permutation of commodities, and buying and ſelling, were not far advanced. If ſo, it was not refining much to think, that a family is not entitled to the poſſeſſion of more land than is ſufficient for the conveniency of living, eſpecially if any other family of the ſame tribe be in want. In this view, an equal diſtribution of land-property, and an agrarian law, might not be ſo difficult an undertaking, as a perſon at preſent will be apt to imagine.

The next epiſode relates to the Feudal law. Though, by the feudal ſyſtem, the property remains with the ſuperior, the right given to the vaſſal being only an uſufruct; yet it appears, that both in England and Scotland the vaſſal was early underſtood to be proprietor. He could alien his land to be held of himſelf; and the alienation was effectual to bar the ſuperior even from his caſualties of ward, marriage, eſcheat, &c. This was not ſolely a vulgar way of thinking; it was deemed to be law by the legiſlature itſelf; witneſs the Engliſh ſtatute, *Quia emptores terrarum*, 18 Edward I. cap. 1. & 2.; Statutes Robert I. cap. 25. It may appear not eaſy to be explained, how a notion ſhould have gained ground ſo repugnant to the moſt obvious principles of law. For it might occur,

occur, even at firſt view, that as the property is reſerved by the ſuperior, he muſt be entitled to poſſeſs the land, and levy the rents upon all occaſions, except where he is excluded by his own deed. And as in every military feu, the ſuperior is entitled to the poſſeſſion, both while there is no vaſſal, and while the vaſſal is young and unable to go to war; how could it be overlooked, that the caſualties of non-entry and ward, which are effectual againſt the vaſſal, muſt be equally effectual againſt every one who comes in his place? I cannot account for this otherwiſe than by obſerving, that property originally differed nothing from a right of poſſeſſion, which gave the enjoyment of the fruits; and therefore, that every man who was in poſſeſſion, and who had the enjoyment of the fruits, was readily conceived to be proprietor. This was the caſe of the vaſſal; and accordingly, when the power of alienation came to be conſidered as an inherent branch of property, it was thought, that a grant made by the vaſſal of part of the land, or even of the whole, to be held of himſelf, muſt be effectual.

One epiſode more before we return to the principal ſubject. So great anxiety in the Roman legiſlature to reſtrain men from doing injuſtice to their own children, has a very odd appearance. "Children are not to be exhere-
"dated without a juſt cauſe, chiefly that of in-
"gratitude.

" gratitude. The cauſe muſt be ſet forth in " the teſtament: It muſt be tried before the " judge, and verified by witneſſes, if denied." Among other nations, natural affection without the aid of law, is a ſufficient motive with parents to do full juſtice to their children. Shall we admit, that natural affection was at a lower ebb among the Romans than among other people? It would ſeem ſo. Yet the Romans, in the more early periods of their hiſtory, were a brave and gallant people, fond of their country, and conſequently, one ſhould think, of their children. Whence then ſhould proceed want of parental affection? I do not ſuppoſe they were left unprovided by nature: But laws and cuſtoms have a ſtrong influence to produce manners contrary to Nature. Let us examine the *patria poteſtas*, as eſtabliſhed by the Roman law. By the law of Nature, the *patria poteſtas* is beſtowed on the father for the ſake of the child; and tends to produce in time a reciprocal affection, the ſtrongeſt our nature is capable of. Nature lays the foundation: Continual attention, on the one hand, to promote the good of a beloved object, and, on the other, continual returns of gratitude, augment mutual affection, till the mind be incapable of any addition. If in any inſtance the event be different, it muſt be occaſioned, either by a wrong application of the *patria poteſtas*, or by an extreme perverſe diſpo-

ſition in the child. But was the *patria poteſtas* among the Romans eſtabliſhed upon the plan of nature? Quite the contrary. It was the power of a tyrant over ſlaves. A man could put his children to death. He could ſell them for a price; and if they obtained their liberty by good luck or good behaviour, he could ſell them a ſecond and a third time. Theſe unnatural powers were perhaps not often put in exerciſe; but they were lawful. This very circumſtance is ſufficient to produce ſeverity in parents, and fear and diffidence in children. There is not like to be in this caſe more harmony, than in pure deſpotiſm betwixt the awful monarch and his trembling ſlaves. In ſhort, the Roman *patria poteſtas*, and the legal reſtraint proprietors were laid under not to hurt their own children, ſerve to illuſtrate each other: There could be no cordiality where ſuch reſtraints were neceſſary. We have reaſon beforehand to conjecture, that the *patria poteſtas* muſt have had ſome ſuch effect; and we have reaſon to be pleaſed with our conjecture, when we find it juſtified by ſubſtantial facts.

Putting now an end to epiſodical amuſements, we proceed with new vigour in our hiſtorical courſe. It was interrupted at that part, where, with a very few exceptions, the powers of a proprietor were extended, one ſhould think, their utmoſt length. Every man had the full enjoyment

ment of his own ſubject, while it remained with him. He might diſpoſe of it for a valuable conſideration, without any reſtraint. He might do the ſame for love and favour; and his power reached even ſo far, as to direct what perſon or perſons ſhould have the enjoyment of it after his death. Would any moderate man covet more power over the goods of fortune that fall to his ſhare? No moderate man will covet more. But many are the men whoſe thirſt of power is never to be quenched. They wiſh to combine their name, family, and eſtate, in the ſtricteſt union; and, leaving nothing to Providence, they wiſh to prolong this union to the end of time. Such ambitious views, ill ſuiting the frail condition of humanity, have produced entails in this iſland; and would have done ſo in old Rome, had ſuch ſettlements been found conſiſtent with the nature of property.

Being arrived at entails in our hiſtorical courſe, it will be neceſſary to diſcuſs a preliminary queſtion, Whether and how far they are conſiſtent with the nature of property? In order to anſwer this queſtion, ſome principles of law muſt be premiſed. The firſt reſpects every ſubject of property, that the whole powers of property, whether united in one perſon, or diſtributed among a plurality, muſt ſubſiſt entire ſomewhere; and that none of them can be ſunk or annihilated, ſo as to be beneficial to no per-

ſon. The reaſon will be obvious when we conſider, that the goods of fortune are intended for the uſe of man; and that it is contrary to their nature to be withdrawn from uſe in whole or in part. A man, if he pleaſe, may abandon his ſubject; but in that caſe, no will nor purpoſe of his can prevent the right of the firſt occupant. No law, natural or municipal, gives ſuch effect to the will of any man. Therefore, if I ſhall diveſt myſelf of any moveable ſubject, beſtowing it upon my friend, but declaring, that though he himſelf may enjoy the ſubject, he ſhall have no power of diſpoſal, ſuch a deed will not be effectual in law. If I be totally diveſted, he muſt be totally inveſted; and conſequently muſt have the power of alienation. The ſame muſt hold in a diſpoſition of land. If the granter reſerve no right to himſelf, the entire property muſt be transferred to the diſponee, however expreſs the granter's will may be to confine the diſponee's property within narrower bounds.

Secondly, Though none of the powers of property can be annihilated by will or conſent, a proprietor however may, by will or conſent, limit himſelf in the exerciſe of his property, for the benefit of others. Such limitations are effectual in law, and are at the ſame time perfectly conſiſtent with abſolute property. If a man be put in chains, or ſhut up in a dungeon, his property in a legal ſenſe is as entire as ever; though

though at preſent he is deprived of the uſe or enjoyment of the ſubjects which belong to him. In like manner, a civil obligation, ſubjecting the proprietor to damages and forfeiture, may reſtrain him by terror from the free uſe of his own ſubject: But ſuch reſtraint limits not his right to the ſubject, more than reſtraint by walls or chains.

A third principle will bring the preſent ſubject fully within view. A practice was derived from Greece to Rome, of adopting a ſon when a man had not iſſue of his own body. This was done in a ſolemn manner before the *Calata Comitia*, who in Rome poſſeſſed the legiſlative authority. The adopted ſon had all the privileges of one born in lawful wedlock; he had the ſame intereſt in the family-eſtate, the ſame right to continue the father's poſſeſſion, and to have the full enjoyment of the ſubject. A teſtament, when authoriſed by the law of the Twelve Tables, received its form from this practice. A teſtament was underſtood to be only a different form of adopting a ſon, which beſtowed the ſame privilege of ſucceeding to the family-eſtate after the teſtator's death, that belonged to the heir adopted in the *Calata Comitia*. A teſtament is in Britain a *donatio mortis cauſa*, an alienation to take effect after death; and the legatee does not ſucceed as heir, but takes as purchaſer, in the ſame manner as if a formal dona-

tion were made in his favour, to have a preſent effect. In Rome, as hinted, a teſtament was of a different nature. It was not a conveyance of land or goods from one perſon to another; it entirely conſiſted in the nomination of an heir, who in this character enjoyed the teſtator's effects. The perſon named took the heritage as heir, not as purchaſer. This explains a maxim in the Roman law, widely differing from our notions, that a man cannot die *pro parte teſtatus et pro parte inteſtatus*; and that if in a teſtament one be named heir, and limited to a particular ſubject, he notwithſtanding is of neceſſity heir to the whole.

The privilege of adoption was never known in Britain; nor have we any form of a writ ſimilar to a Roman teſtament, which a man could uſe, if he were diſpoſed to exclude his natural heir, and to name another in his place. Teſtaments we had early; but not in the form of a nomination of heirs. This writ is a ſpecies of alienation, whether we conſider moveables, which is its ſole province in Scotland, or land, to which in England it was extended by the above-mentioned ſtatute of Henry VIII. Therefore, by the common law of this land, there is no method for ſetting aſide the natural heirs, otherwiſe than by an alienation of the eſtate *inter vivos* or *mortis cauſa*. Nor in this caſe does the diſponee take as heir; he takes as purchaſer;

chaſer; and the natural heirs are not otherwiſe excluded, than by making the ſucceſſion unprofitable to them. This may ſerve to explain a maxim in our old law, which, to thoſe educated in the Roman notions, muſt appear obſcure, if not unintelligible. The maxim is, That God only can make an heir, not man *. The Roman teſtament laid a foundation for a diſtinction among heirs. They were either *heredes nati* or *heredes facti*. Our common law acknowledges no ſuch diſtinction: No man can have the character of an heir but an heir of blood.

We are now, I preſume, ſufficiently prepared to enter upon the intricate ſubject of entails. And to prevent the embarraſſment of too much matter on hand together, we ſhall firſt examine the power of ſubſtituting a ſeries of heirs to each other, who are to take the heritage in their order, excluſive of the natural heirs; and then proceed to the limitations impoſed upon heirs, which prevent alienation, whether direct by diſponing land, or indirect by contracting debt. A maxim in the Roman law, concerning heirs, is neceſſary in explaining the firſt point. A Roman teſtator could name any perſon to be his heir, but he had not the power to name ſubſtitutes; for thus ſays the maxim, NO MAN CAN NAME AN HEIR TO SUCCEED TO HIS HEIR. The reaſon will appear when we reflect upon

* Glanvil, l. 7. cap. 1.; Reg. Maj l. 2. cap. 20. § 4.

ſome particulars already explained. The heir, whether *natus* or *factus*, became unlimited proprietor as ſoon as the predeceſſor was dead. The inheritance was now his, and entirely at his diſpoſal. If he made a teſtament, the heir named by him took place of the heir named by his predeceſſor; and if he died *inteſtate*, the ſucceſſion opened to his own natural heirs. For it is the will of the proprietor that muſt regulate his own ſucceſſion; and not the will of any other, not even of a predeceſſor. This maxim then is not founded upon any peculiarity in the Roman law, but upon the very nature of property. While a ſubject is mine, it is entirely at my diſpoſal; but after beſtowing it upon another without any reſervation, my power is at an end; and my will, though expreſſed while I was proprietor, cannot now have the effect to limit the power of the preſent proprietor. An heir named in a Roman teſtament, might, it is true, be ſubjected perſonally to whatever burdens or obligations the teſtator thought proper to impoſe upon him: But we ought not to loſe ſight of the difference betwixt a real burden or limitation and a perſonal obligation. A man, by his own conſent, may reſtrain himſelf from the uſe of his property; but the full property nevertheleſs remains with him.

One exception to this rule was introduced from utility, viz. the pupillar ſubſtitution. A

proprietor

proprietor who had a ſon under age to ſucceed him as his heir, was impowered to name a ſubſtitute, who took the eſtate as heir to the ſon, in caſe the ſon died ſo early as to be incapable of making a teſtament. In all other caſes, if a teſtator, after naming his heir, inclined to make a ſubſtitution, he had no other method but to take the heir bound perſonally to make over the eſtate to the ſubſtitute. This form of a ſettlement is known by the name of *Fideicommiſſum*. And after the ſubſtitute ſucceeded by virtue of the *fideicommiſſary* clauſe, there was an end of the entail.

The foregoing maxim, That no man can regulate the ſucceſſion of his heir, holds in property only, not in inferior rights. If a proprietor grant a right burdening or limiting his property, and call to the ſucceſſion a certain ſeries of heirs, it is clear, that neither the grantee nor any of the heirs named, who accept the right in theſe terms, have power, without the conſent of the granter or his heirs, to alter the order of ſucceſſion. In the practice even of the Roman law, where the foreſaid maxim was inviolable, it was never doubted, that in a perpetual leaſe, termed *Emphyteuſis*, or in any leaſe, it is in the power of the granter to regulate the ſucceſſion of the leſſee. For the ſame reaſon, in our feudal rights, a perpetual ſucceſſion of heirs eſtabliſhed in the original grant, is conſiſtent with the

the ſtricteſt principles of property. The order of ſucceſſion cannot be altered without conſent of the ſuperior; for it would be a breach of agreement, to force upon him as vaſſal any perſon who is not called to the ſucceſſion by the original grant. And thus in Britain it came to be an eſtabliſhed practice, by means of the feudal ſyſtem, not that a man ſingly can name an heir to his heir; but that, with conſent of the ſuperior, he can ſubſtitute heirs without end, to take the feudal ſubject ſucceſſively one after another (9).

The perſons thus called to the ſucceſſion of the feudal ſubject, are in Scotland underſtood to be heirs to the original grantee, whether they be of his blood or not. This way of thinking is borrowed from the Roman law, in which every perſon is eſteemed an heir who is called

(9) According to the original conſtitution of a feudal holding, a perpetual ſucceſſion was eſtabliſhed on a foundation ſtill more clear and indiſputable. A feudal holding, while it was beneficiary and not patrimonial, admitted not, properly ſpeaking, of a ſucceſſion of heirs. When a vaſſal died, the ſubject returned to the ſuperior, who made a new grant in favour of the heir called to the ſucceſſion in the original grant; and ſo on till all the heirs were exhauſted to whom the ſucceſſion was originally limited; after which the ſubject returned ſimply and abſolutely to the ſuperior. The title, therefore, of poſſeſſion being a new grant from the ſuperior, the perſons called to the ſucceſſion could not properly be conſidered as heirs but as purchaſers.

called by will to the ſucceſſion. He is at leaſt *heres factus*, according to their language, if not *heres natus*. In this we have deviated from our own common law, which acknowledges none to be an heir who is not of the predeceſſor's blood.

In England different notions have obtained. The maxim, That God only can make an heir, not man, is not ſo ſtrictly taken, as to exclude every perſon from the character of an heir, ſave the heir at law only. From the beginning nothing was more common in feudal grants, than to chuſe a certain ſpecies of heirs, ſuch as the male deſcendents of the original vaſſal, or the heirs of a marriage. Theſe are heirs in the ſenſe of the Engliſh law, though they may happen not to be the heirs who would ſucceed by law. Hence every perſon who is called to the ſucceſſion under a general deſcription, ſuch as heirs of the granter's body, or male iſſue, or heirs of a marriage, or male iſſue of a marriage, is conſidered as an heir. The true ſenſe of the maxim appears then to be, That no perſon can have the character of an heir who is not of the blood of the original vaſſal: Alſo, that it is not ſufficient to be of the blood, unleſs he be alſo called under ſome general deſcription. Therefore, in England, when a ſtranger or any man is by name called to the ſucceſſion, he is underſtood to be called as a conditional inſtitute; preciſely

preciſely as if one grant were made to Sempronius and the heirs of his body; and another grant of the ſame ſubject to Titius and the heirs of his body, to take effect whenever the heirs of Sempronius ſhould fail. Titius, in this caſe, is not called in the quality of an heir to Sempronius: he is, as well as Sempronius, an inſtitute, or a diſponee; only that the right of Sempronius is pure, and that of Titius conditional. This conditional right is in England termed a *Remainder;* and as a remainder-man is not conſidered to be an heir, he is not liable to fulfil any of the debts or deeds of the firſt inſtitute, or of his heirs; and when theſe heirs are exhauſted, he takes, not by a ſervice upon a brieve *quod diem clauſit ſupremum*, but as purchaſer, by authority of the original grant.

Thus it is, that the Feudal law, by furniſhing means for a perpetual ſucceſſion of heirs as in Scotland, or of heirs and remainder men as in England, hath foſtered the ambitious views of men to preſerve their names, families, and poſſeſſions, in perpetual exiſtence. The feudal ſyſtem, as originally conſtituted, was qualified to fulfil ſuch views in every particular. It not only paved the way for a perpetual ſucceſſion, but ſecured the heirs by preventing dilapidation.

And this leads naturally to the ſecond point propoſed to be handled with reſpect to entails, viz. The limitations impoſed upon heirs to prevent

vent aliening or contracting debt. This followed from the very nature of the feudal ſyſtem; for the vaſſal's right, being a liferent or uſufruct only, gave him no power of alienating the property, which remained with the ſuperior. It was only unlucky for entails, that during the vigour of the Feudal law, conſtant wars and commotions, a perpetual hurry in attacking or defending, afforded very little time for indulging views of perpetuity. In times only of peace, ſecurity, and plenty, do men dream of diſtant futurity, and of perpetuating their eſtates in their families. The Feudal law loſt ground in times of peace. It was a violent and unnatural ſyſtem, which could not be long ſupported in contradiction to love of independence and property, the moſt ſteady and induſtrious of all the human appetites. After a regular government was introduced in Britain, which favoured the arts of peace, all men conſpired to overthrow the Feudal ſyſtem. The vaſſal was willing to purchaſe independence with his money; and the ſuperior, who had no longer occaſion for military tenants, diſpoſed of his land to better advantage. In this manner, land, which is the chief object of avarice, came again to be the chief ſubject of commerce: And that this was early the caſe in Britain, we have undoubted evidence from the famous ſtatute, *Quia emptores terrarum* above mentioned. By this time the

ſtrict

ſtrict principles of the Feudal law had vaniſhed, and ſcarce any thing was left but the form only. Land, now reſtored to commerce, was moſtly in the hands of purchaſers who had paid a valuable conſideration; and conſequently, inſtead of being beneficiary as formerly, it had now become patrimonial. The property being thus transferred from the ſuperior to the vaſſal, the vaſſal's power of alienation was a neceſſary conſequence.

But men who had acquired great poſſeſſions, and who, in quiet times, found leiſure to think of perpetuating their families, began now to regret the never-ceaſing flux of land-property from hand to hand; and, revolving the hiſtory of former times, to wiſh for the wonted ſtability of land-property, if it could be obtained without ſubjecting themſelves to the ſlaviſh dependence of the Feudal law. In particular, when a grant of land was made to a family, conditioned to return to the granter and his heirs when the family was at an end, it was thought hard, that the vaſſal, contrary to the condition of his right, could ſell the land, or diſpoſe of it at his pleaſure, as if he had been a purchaſer for a full price. To fulfil the intention of thoſe who after this manner ſhould make voluntary ſettlements of land, the Engliſh, after the fetters of the Feudal law were gone, found that a ſtatute was neceſſary; and to this end the ſtatute *de donis*

donis conditionalibus was made *. It proceeds upon the recital, 1ſt, Of land given to a man and his wife, and their iſſue, conditionally, that if they die without iſſue, the land ſhall revert to the giver and his heirs. 2dly, Of land given in free marriage, which implies a condition, though not expreſſed, that if the huſband and wife die without iſſue, the land ſhall revert to the giver or his heirs. And, 3dly, Of land given to a man and the heirs of his body, conditionally, that it ſhall, in like manner, revert, failing iſſue. It ſubſumes, that, contrary to the conditions expreſſed or implied in ſuch grants, the feoffees had power to alien the land, to the diſappointment not only of the heirs, as to their right of ſucceſſion, but alſo of the donor, as to his right of reverſion. Therefore it is enacted, "That "the will of the donor ſhall be from hence-"forth obſerved, ſo that the donees ſhall have "no power to alien the land, but that it ſhall "remain to the iſſue choſen in the deed, and "when they fail, ſhall revert to the donor or "his heirs." And thus in England, a privilege was beſtowed upon proprietors of land, to eſtabliſh perpetuities by depriving the heirs of the power of aliening, which could not be done by common law.

In Scotland we had no ſtatute authoriſing entails till the 1685, though before that time we had

* 13 Edward I. cap. 1.

had entails in plenty, many of which are ſtill ſubſiſting. It was the opinion of our lawyers, as it would appear, that by private authority an entail can be made ſo as to bar alienation. To this end, clauſes prohibitory, irritant, and reſolutive, were contrived, which were reckoned effectual to preſerve an entailed ſubject to the heirs in their order, and to void every deed prejudicial to theſe heirs. Whether this be a juſt way of thinking I proceed to examine.

To preſerve the ſubject in view, I take the liberty ſhortly to recapitulate what is ſaid above on this point. While the Feudal law was in vigour, there was no occaſion for prohibitory clauſes: The vaſſal's right being uſufructuary only, carried not the power of alienation, nor of contracting debt, ſo as to be effectual againſt the heir of the inveſtiture. But the Feudal law is in England quite extirpated; nor doth it ſubſiſt in Scotland except merely as to the form of our title-deeds. Land with us has for ſeveral ages been conſidered as patrimonial. A vaſſal has long enjoyed the power of contracting debt, and even of alienating *mortis cauſa*. To reſtrain him therefore in any degree from the exerciſe of his property, can only be effectuated by ſtatute or by conſent. The former requires no diſcuſſion. It is evident, that the reſtraints impoſed by ſtatute, of whatever nature, muſt be effectual; becauſe every deed done

done in contempt of the law, is voidable, if not null and void. The latter requires a more particular examination, before we can form an accurate judgment of its effects. For the ſake of perſpicuity, we ſhall adapt our reaſoning to an entail made in the common form, with a long ſeries of heirs, guarded only with a prohibitory clauſe, directed againſt every one of the heirs of entail, in order to reſtrain them from aliening and from contracting debt. It is plain, that every ſingle heir, who accepts the ſucceſſion, is bound by this prohibition, as far as he can be bound by his own conſent. His very acceptance of the deed, vouched by his ſerving heir and taking poſſeſſion, ſubjects him to the prohibition; for juſtice permits no man to take benefit by a deed without fulfilling the proviſions and burdens impoſed on him in the deed. Admitting then, that the heir is bound by his acceptance, let us enquire, whether that be ſufficient to make the entail effectual. He tranſgreſſes the prohibition, and ſells the eſtate: Will not the purchaſer be ſecure, leaving to the heirs of entail an action againſt the vender for damages? Whatever may be thought of a purchaſer who buys knowingly from an heir of entail, in whom it is a breach of duty to ſell, a *bona fide* purchaſer muſt undoubtedly be ſecure. Or let us ſuppoſe the eſtate to be adjudged for payment of debt. It is neceſſity and not choice

that makes a creditor proceed to legal execution: And ſuppoſing him to be in the knowledge of the reſtraint, there can be no injuſtice in his taking the benefit of the law to make his claim effectual. Hence it is plain, that a prohibition cannot alone have the effect to ſecure the eſtate againſt the debts and deeds of the tenant in tail.

To ſupply this defect, lawyers have invented a reſolutive or irritant clauſe, for voiding the right of a tenant in tail, who, contrary to a prohibition, aliens or contracts debt. That a reſolutive or irritant clauſe cannot have the ſame effect with a legal forfeiture, is even at firſt view evident. A forfeiture is one of the puniſhments introduced for repreſſing certain heinous crimes; and it is inconſiſtent with the nature of the thing, that a perſon ſhould be puniſhed who is not a criminal. An alienation by a tenant in tail, in oppoſition to the will of the entailer, is no doubt a wrong: But then it is only a civil wrong inferring damages, and not a delinquency to infer any ſort of puniſhment; far leſs a puniſhment of the ſevereſt kind, which at any rate cannot be inflicted but by authority of a ſtatute. If now a reſolutive or irritant clauſe cannot have any effect as a puniſhment, its effect, if any, muſt depend on the conſent of the tenant in tail, who accepts the deed of entail under the conditions and proviſions contained in it. Such implied

implied conſent, taken in its utmoſt latitude, cannot be more binding than an expreſs conſent ſignified by the heir in writing, binding himſelf to abandon his right to the land, upon the firſt act of tranſgreſſion, or of contravention as we call it, whether by aliening or contracting debt. This device to ſecure an entailed ſubject, though it hath exhauſted the whole invention of the learned in our law, is however ſingularly unlucky, ſeeing it cannot be clothed in ſuch words, as to hide, or even obſcure, a palpable defect. The conſent here is in its nature conditional: "I ſhall abandon if I tranſgreſs or "contravene any of the prohibitions." Therefore, from the very nature of the thing, there can be no abandon till there firſt be an act of contravention. This is no leſs clear than that the crime muſt precede the puniſhment. Where then is the ſecurity that ariſes from a reſolutive clauſe? A tenant in tail agrees to ſell by the lump: A diſpoſition is made out—nothing wanting but the ſubſcription: The diſponer takes a pen in his hand, and begins to write his name. During this act there is no abandon nor forfeiture, becauſe as yet there is no alienation. Let it be ſo, that the forfeiture takes place upon the laſt ſtroke of the pen: But then the alienation is alſo completed by the ſame ſtroke; and the land is gone paſt redemption. The defect is ſtill more palpable, if poſſible, in

the caſe of contracting debt. No man can ſubſiſt without contracting debt more or leſs; and no lawyer has been found ſo chimerical as to aſſert, that the contracting debt ſingly will produce a forfeiture. All agree, that the debtor's right is forfeited no ſooner than when the debt is ſecured upon the land by an adjudication. But what avails the forfeiture after the debt is made real and ſecured upon the land? In a word, before the adjudication be completed, there can be no forfeiture, and after it is completed the forfeiture comes too late.

But this imperfection of a reſolutive or irritant clauſe, though clear and certain, needed ſcarce to have been mentioned; becauſe it will make no figure in compariſon with another, which I now proceed to unfold. Let us ſuppoſe, contrary to the nature of things, that the forfeiture could precede the crime; or let us ſuppoſe the very ſimpleſt caſe, that a tenant in tail conſents to abandon his right without any condition; what will follow? It is a rule in law, which never has been called in queſtion, That conſent alone without delivery cannot transfer property. Nay, it is univerſally admitted, that conſent alone cannot even have the effect to diveſt the conſenter of his property, till another be inveſted; or, which comes to the ſame, that one infeftment cannot be taken away but by another. If ſo, what avails a reſolutive clauſe more than

one

one that is ſimply prohibitory? Suppoſe the conſent to abandon, which at firſt was conditional, is now purified by an act of contravention; the tenant in tail is indeed laid open to have his right voided, and the land taken from him: But ſtill he remains proprietor, and his infeftment ſtands good till the next heir be infeft; or at leaſt till the next heir obtain a decree declaring the forfeiture. Before ſuch proceſs be commenced, every debt contracted by the tenant in tail, and every diſpoſition granted by him, muſt be effectual, being deeds of a man, who at the time of executing was proprietor. In fine, a conſent to abandon, ſuppoſing it purified, can in no view have a ſtronger effect, than a contract of ſale executed by a proprietor who is under no limitation. All the world know, that this will not bar him from ſelling the land a ſecond time to a different perſon, who getting the firſt infeftment will be ſecure; leaving no remedy to the firſt purchaſer, but an action of damages againſt the vender. In like manner, a tenant in tail, after tranſgreſſing every prohibition contained in the entail, and after all the irritancies have taken place, continues ſtill proprietor, until a decree declaring the irritancy be obtained; and ſuch being the caſe, it follows of neceſſary conſequence, that every debt contracted by him, and every deed

done by him, while there is yet no declarator, muſt be effectual againſt the entailed eſtate.

I am aware, that in the deciſion, 26th February 1662, Viſcount of Stormont *contra* heirs of line and creditors of the Earl of Annandale, prohibitory and reſolutive clauſes engroſſed in the infeftment were ſuſtained, as being equivalent to an interdiction; every man being preſumed to know the condition of the perſon with whom he deals. But it appears probable, that this judgment was obtained by a prevailing attachment to entails, which at that time had the grace of novelty, and were not ſeen in their proper light. There is certainly no ground for beſtowing the force of an interdiction upon prohibitory and reſolutive clauſes in an entail. An interdiction is a writ of the common law, prohibiting the proprietor to ſell without conſent of his interdictors, and prohibiting every perſon to deal with him without ſuch conſent. It is notified to all and ſundry by a ſolemn act of publication, which puts every perſon *in mala fide* to deal with a proprietor who is interdicted; and it is a contempt of legal authority to tranſgreſs the prohibition. But where lies the contempt of legal authority in a fair purchaſe from an heir of entail? An entailer may give law to his heirs, but what authority has he over ſtrangers to prohibit them to lend money to his heir, or to purchaſe from him? An interdiction beſide

ſide is appointed to be publiſhed, without which it has no force: But before the 1685, there was no law for publiſhing the conditions of an entail. It has indeed been urged, that there is no neceſſity for publication, becauſe every man is preſumed to be acquainted with the circumſtances of thoſe with whom he contracts. I deny there is any ſuch legal preſumption. In fact, nothing is more common than to execute a contract of ſale, without ſeeing any of the title-deeds of the ſubject purchaſed; and a diſcovery afterward of the entail will not oblige the purchaſer to relinquiſh a profitable bargain. At any rate, the contract of ſale muſt operate to him, if not a performance of the bargain, at leaſt a claim of damages againſt the vender, either of which deſtroys the entail. What if the creditors of the tenant in tail, or perhaps of the entailer, have arreſted the price in the hands of the purchaſer? He cannot afterward hurt the arreſters by paſſing from the contract of ſale. Let us put another caſe, That entailed lands, after being ſold and the purchaſer infeft, have paſſed through ſeveral hands by ſimilar purchaſes. It ſurely will not be affirmed, that the laſt purchaſer, in poſſeſſion of the land, muſt be preſumed to know that the land was derived from a tenant in tail. This would be ſtretching a preſumption very far. But I need not go farther than the contracting of debt, to ſhow the weakneſs

of the argument from preſumed knowledge. Perſons without their conſent become creditors every day, who furniſh goods or work for ready money, and yet obtain not payment; ſometimes againſt their will, as when a claim of damages is founded upon a wrong done. When one becomes cautioner for his friend, it is not uſual to conſult title-deeds. In ſhort, ſo little foundation is there for this preſumption of knowledge, that the act 24. parl. 1695, made for the relief of thoſe who contract with heirs-apparent, is founded upon the direct oppoſite preſumption.

Some eminent lawyers, aware of the foregoing difficulties, have endeavoured to ſupport entails, by conceiving a tenant in tail to be in effect but a liferenter, preciſely as of old when the Feudal law was in vigour. What it is that operates this limitation of right, they do not ſay. Nor do they ſay upon what authority their opinion is founded: Not ſurely upon any entail that ever was made. If the full property be in the entailer, it muſt be equally ſo in every heir of entail who repreſents him; becauſe, ſuch as he has it, it is conveyed to the heirs of entail whole and undivided, without reſerving any ſhare to himſelf or to a ſeparate ſet of heirs. But the very form of an entail is ſufficient to confute this opinion: For why ſo many anxious prohibitory and irritant clauſes, if a tenant in

tail

tail were reſtrained from aliening by the limited nature of his right? Fetters are very proper where one can do miſchief; but they make a moſt ridiculous figure upon the weak and timorous, incapable of doing the leaſt harm.

What is ſaid on this head may be contracted within narrower bounds. It reſolves into a propoſition, vouched by our lawyers, and admitted by our judges in all their reaſonings upon the ſubject of entails, viz. That a reſolutive clauſe when incurred, doth not *ipſo facto* forfeit the tenant in tail, but only makes his right voidable, by ſubjecting him to a declarator of forfeiture; and that there is no forfeiture till a decree of declarator be obtained. Such being the eſtabliſhed doctrine with reſpect to irritant clauſes, I never can ceaſe wondering, to find it a general opinion, that an entail with ſuch clauſes is effectual by the common law. For what propoſition can be more clear than the following, That as long as a man remains proprietor, his debts muſt be effectual againſt his land as well as againſt himſelf? What compariſon can be more accurate, than betwixt a tenant in tail who has incurred an irritancy, and a feuer who has neglected to pay his feu-duties for two years? Both of them are ſubjected to a declarator of irritancy, and both of them will be forfeited by a decree of declarator. But an adjudication upon the feuer's debt, before commencing the declarator,

declarator, will be effectual upon the land. This was never doubted; and there is as little reaſon to doubt, that an adjudication upon the debt of a tenant in tail, muſt, in the ſame circumſtances, be equally effectual. If there be a difference, it favours the latter, who cannot be ſtript of his right till it be acquired by another; whereas a bare extinction of the feuer's right is ſufficient to the ſuperior. I cannot account for an opinion void of all foundation, otherwiſe than from the weight of authority. Finding entails current in England, we were by force of imitation led to think, they might be equally effectual here; being ignorant, or not adverting, that in England their whole efficacy is derived from ſtatute.

I ſhall conclude this tract with a brief reflection upon the whole. While the world was rude and illiterate, the relation of property was faint and obſcure. This relation was gradually unfolded, and in its growth toward maturity accompanied the growing ſagacity of mankind, till it became vigorous and authoritative, as we find it at preſent. Men are fond of power, eſpecially over what they call their own; and all men conſpired to make the powers of property as extenſive as poſſible. Many centuries have paſſed ſince property was carried to its utmoſt length. No moderate man can deſire more than to have the free diſpoſal of his goods during

during his life, and to name the perſons who ſhall enjoy them after his death. Old Rome, as well as Greece, acknowledged theſe powers to be inherent in property; and theſe powers are ſufficient for all the purpoſes to which goods of fortune can be ſubſervient: They fully anſwer the purpoſes of commerce; and they fully anſwer the purpoſes of benevolence. But the paſſions of men are not to be confined within the bounds of reaſon: We thirſt after opulence; and are not ſatisfied with the full enjoyment of the goods of fortune, unleſs it be alſo in our power to give them a perpetual exiſtence, and to preſerve them for ever to ourſelves and our families. This purpoſe, we are conſcious, cannot be fully accompliſhed; but we approach to it the neareſt we can, by the aid of imagination. The man who has amaſſed great wealth, cannot think of quitting his hold; and yet, alas! he muſt die and leave the enjoyment to others. To colour a diſmal proſpect, he makes a deed, arreſting fleeting property, ſecuring his eſtate to himſelf, and to thoſe who repreſent him, in an endleſs ſucceſſion: His eſtate and his heirs muſt for ever bear his name; every thing to perpetuate his memory and his wealth. How unfit for the frail condition of mortals are ſuch ſwoln conceptions? The feudal ſyſtem unluckily ſuggeſted a hint for gratifying this irrational appetite. Entails in England, authoriſed by ſtatute,

ſpread

ſpread every where with great rapidity, till becoming a public nuiſance, they were checked and defeated by the authority of judges without a ſtatute. It was a wonderful blindneſs in our legiſlature, to encourage entails by a ſtatute, at a time when the public intereſt required a ſtatute againſt thoſe which had already been impoſed upon us. A great proportion of our land is already, by authority of the ſtatute 1685, exempted from commerce. To this dead ſtock portions of land are daily added by new entails; and if the Britiſh legiſlature interpoſe not, the time in which the whole will be locked up, is not far diſtant. How pernicious this event muſt prove, need not to be explained. Land-property, naturally one of the great bleſſings of life, is thus converted into a curſe. That entails are ſubverſive of induſtry and commerce, is not the worſt that juſtly can be ſaid of them: They appear in a ſtill more diſagreeable light, when viewed with relation to thoſe more immediately affected. A ſnare they are to the thoughtleſs proprietor, who, even by a ſingle act, may be entangled paſt hope of relief: To the cautious they are a perpetual ſource of diſcontent, by ſubverting that liberty and independence, to which all men aſpire, with reſpect to their poſſeſſions as well as their perſons.

TRACT

TRACT IV.

SECURITIES upon Land for Payment of Debt.

LAND is not only the moſt valuable ſubject of commerce, but the moſt commodious by admitting a variety of real rights. Thus the property of land is ſplit, between ſuperior and vaſſal, debtor and creditor, and between one having a perpetual, one a temporary right.

In Scotland we diſtinguiſh, and not without reaſon, rights affecting land into two kinds, viz. property, and a right burdening or limiting property. The property of a ſubject cannot otherwiſe be bounded but by rights burdening or narrowing it; and it is reſtored to its original unbounded ſtate, as ſoon as the burdening right is extinguiſhed: But a burdening right, being in its nature bounded, becomes not more extenſive by the extinction of other rights affecting the ſame ſubject. The Engliſh differ in their notions of land-rights, at leaſt in their terms. Without diſtinguiſhing property from other rights, they conceive every right affecting land, the moſt extenſive and the moſt limited, to be

an

an eſtate in the land. A fee-ſimple, a fee-tail, a liferent, a rent-charge, a leaſe for life, paſs all equally under the denomination of an eſtate.

The grafting on land rights of ſuch different kinds, favourable indeed to commerce, makes law intricate, and purchaſes inſecure: But theſe inconveniencies are unavoidable in a commercial country. Land is not diviſible indefinitely; for the poſſeſſion of a ſmaller quantity than what occupies a plough or a ſpade, is of no uſe: And he who poſſeſſes the ſmalleſt profitable ſhare, may be engaged in tranſactions and connections, not fewer nor leſs various than he who poſſeſſes a large territory. It may be his will to make a ſettlement, containing remainders, reverſions, rent-charges, &c.; and it is the province of municipal law, to make effectual, as far as utility will admit, private deeds and conventions of every ſort. This is ſo evident, that wherever we read of great ſimplicity in the manner of tranſmitting land-property, we may aſſuredly pronounce, that the people are not far advanced in the arts of life.

The foregoing curſory view of land-rights, lead to the ſubject propoſed to be handled in this eſſay. The Romans had two forms of a right upon land for ſecurity of money. The one, diſtinguiſhed by the name of *antichreſis*, reſembles the Engliſh mortgage, and our wadſet; the creditor being introduced into poſſeſ-

ſion

ſion to levy the rents for extinguiſhing the ſum that is due him. The other, termed a *hypothec*, is barely a ſecurity for money, without power to levy the rents for payment. As to the former, whether any ſolemnity was requiſite to compleat the right, I cannot ſay, becauſe that ſort of ſecurity is but ſlightly mentioned in Juſtinian's compilations: Neither is it told us whether any form was requiſite to compleat the latter. One thing ſeems evident with reſpect to a hypothec, that an act of poſſeſſion, whether real or ſymbolical, cannot be required as a ſolemnity. But as it is difficult to conceive, that a right can be eſtabliſhed upon land by conſent alone, without ſome ouvert act, therefore in Holland there is required to the conſtitution of a hypothec upon land or houſes, the preſence of a judge *. And in Frieſland, to complete a general hypothec, ſo as to give it preference, regiſtration is neceſſary †.

By the Roman law, to make a hypothec effectual, when payment could not be obtained from the debtor, the creditor was impowered to expoſe the land to ſale after repeated denunciations. He needed not the authority of a judge; and as he himſelf was the vender, he for that reaſon could not be alſo the purchaſer. But Voet ‡ obſerves, that in Holland the authority of

* Voet, tit. De pignor. et hypoth. § 9. & 10.

† Ibid. § 10. ‡ Tit. De deſtruct. pignor. § 3.

of a judge being neceſſary, and the judge being the vender, the creditor may be the purchaſer.

It appears to have been of old, both in England and Scotland, a lawful practice, to force payment of debt, by taking at ſhort hand from the debtor a pledge, which was detained by the creditor till the debtor repledged the ſame, by paying the debt, or finding ſecurity for the payment. This rough practice was in England prohibited by the ſtatute 52d Henry III. cap. 1. enacting, "That no man take a diſtreſs of his "neighbour without award of court." In Scotland it was reſtrained by ſeveral ſtatutes. In the firſt ſtatutes Robert I. cap. 7. it is enacted, "That in time coming no man take a "poynd for debt within another man's land, "unleſs the king's baillie, or the baillie of the "ground be preſent." And in the ſtatutes of David II. cap. 6. "That if a man dwelling in "one ſhire deſire to take a poynd in another "ſhire, it muſt be done in preſence of the ſheriff or his depute." Again, in the ſtatutes of Robert III. cap. 12. it is enacted in general, "That no man ſhall take a poynd without the "King's officers or the lord's officers of the "land, unleſs within his own land, for his "farms or proper debts." See to the ſame purpoſe, *Reg. Maj. l. 4. cap. 22.*

But theſe regulations did not extend to poinding within a royal borough. For though a burgeſs

geſs might not poind a brother-burgeſs without licence from the provoſt *, yet from a ſtranger found within the borough he might take a poind or pledge at ſhort hand †; and the ſtranger was obliged to repledge in common form, by finding a ſurety for the debt ‡. This is evidently the foundation of a privilege which burgeſſes enjoy at this day, viz. arreſting ſtrangers for debts contracted within the borough.

Neither did theſe regulations extend to rents or feu duties, for which in England the landlord may to this day diſtrain at ſhort hand. And in this part of the iſland, as a proprietor might poind at ſhort hand for his houſe-mail ‖, and for his rents in the country **, ſo this privilege is expreſsly reſerved to him in the abovementioned ſtatute of Robert III. This privilege of the landlord may be traced down to the preſent time; with ſome reſtrictions introduced by change of manners. Craig obſerves ††, That the landlord for three terms rent can poind by his private authority; and ‡‡ that for the price of the ſeiſin-ox, which the vaſſal pays for his entry, the ſuperior may diſtrain without proceſs. Nor at preſent is the landlord or ſuperior ſubjected

* Leg. Burg. cap. 4.
† Cap. 34. & 58.
‡ Cap. 35. & 37.
‖ Cap. 57.
** Firſt Stat. Robert I. cap. 7.
†† L. 1. dieg. 10. § 38. in fine.
‡‡ L. 2. dieg. 7. § 26.

ſubjected to the ordinary ſolemnities. It is required, indeed, that the arrears be conſtituted by a decree in his own court, which has been introduced in imitation of poinding for other debts; but after conſtituting the arrears by a decree, he may proceed directly to poind without giving a charge *.

Nor is it difficult to diſcover the foundation of this privilege. It will appear in a clear light by tracing the hiſtory of leaſes in this iſland. Lands originally were occupied by bond-men, who themſelves were the property of the landlord, and conſequently were not capable to hold any property of their own: But ſuch perſons, who had no intereſt to be induſtrious, and who were under no compulſion when not under the eye of their maſter, were generally lazy, and always careleſs. This made it eligible to have a free-man to manage the farm; who probably at firſt got ſome acres ſet apart to him for his maintenance and wages. But this not being a ſufficient ſpur to induſtry, it was found a ſalutary meaſure to aſſume this man as a partner, by communicating to him a proportion of the product in place of wages; by which he came to manage for his own intereſt as well as that of his maſter. The next ſtep had ſtill a better effect, entitling the maſter to a yearly quantity certain, and the overplus to remain with the ſervant.

* Act 4. parl. 1669.

ſervant (1.). By this contract, the benefit of the ſervant's induſtry accrued wholly to himſelf; and his indolence or ignorance hurt himſelf alone. One farther ſtep was neceſſary to bring this contract to its due perfection, which is, to give the ſervant a leaſe for years, without which he is not ſecure that his induſtry will turn to his own profit. By a contract in theſe terms, he acquired the name of *tenant*; becauſe he is entitled to hold the poſſeſſion for years certain. According to this deduction, which is ſupported by the nature of the thing, the tenant had a claim for that part only of the product to which he was entitled by the contract. He had no real lien to found upon in oppoſition to his landlord's property. The whole fruits as *pars ſoli* belonged to the landlord while growing upon the ground; and the act of ſeparating them from the ground, could not transfer the property from him to his tenant: Neither could payment of the rent transfer the property of the remaining fruits, without actual delivery. It is true, the tenant, impowered by the contract, could lawfully apply the remainder to his own uſe: But ſtill, while upon the ground, it was the landlord's property; and for that

 reaſon,

(1) Servis, non in noſtrum morem, deſcriptis per familiam miniſteriis, utuntur. Suam quiſque ſedem, ſuos penates regit. Frumenti modum dominus, aut pecoris, aut veſtis, ut colono injungit. *Tacitus de moribus Germanorum.*

reaſon, as we ſhall ſee afterward, it lay open to be attached for payment of the landlord's debts.

But in courſe of time our notions varied conſiderably. The tenant who is in poſſeſſion of the land, who ſows and reaps, and who after paying the rent diſpoſes of the product at his pleaſure, will naturally be conſidered as proprietor of the product; eſpecially after the act 18. parl. 1449, ſecuring him againſt a purchaſer of the land. The vulgar are led by impreſſions of ſight, with very little regard to abſtract objects. I lay the greater weight on this obſervation, becauſe the ſame means produced a capital revolution in our law, viz. the transference of the property from the ſuperior to his vaſſal. Of which afterward, Tract 5. The landlord's property however continued inviolable, ſo far as his rent extended. To this limited effect he was held proprietor; and therefore there was nothing ſingular in allowing him to levy his rents by his own authority, whether from his tenants or from his feuers, who differ not from tenants but in the perpetuity of their leaſes. It was no more than what follows from the very nature of property; for no man needs the authority of a judge to lay hold of his own goods. There could not be a ſcruple about this privilege, while rents were paid in kind; and landlords, authoriſed by cuſtom, proceeded in the ſame train when money-rent was introduced,

duced, without adverting to the difference. But after the landlord's rent was paid, it ſoon came to be reckoned an intolerable grievance, or rather groſs injuſtice, that the landlord's creditor ſhould be admitted to poind the remainder, which was in effect the tenant's property. A remedy was provided as to perſonal debt, by the act 36. parl. 1469, reſtricting poindings for ſuch debts, to the extent of the arrears due by the tenant, and to the current term. With regard to debts ſecured upon the land, the legiſlature did not interpoſe; for it was judged, that the creditor who had a real lien upon the land, had the ſame title to the fruits for payment of his intereſt, that the landlord had for payment of his rent. It was not adverted to, that a creditor is not bound to take poſſeſſion of the land for his payment; that the landlord is entitled to levy the rent if the creditor forbear; and that it is unjuſt to oblige the tenant to pay the ſame rent twice. But what was neglected or avoided by the legiſlature, was provided for by cuſtom, juſtice prevailing over ancient uſage. And now, tenants are by practice ſecure againſt poindings for real debts, as well as they are by ſtatute againſt poinding for perſonal debts. In England, it appears, that to this day the creditor in a rent-charge may levy a diſtreſs to the extent of what is due to him, without confining the diſtreſs to the rent due by the tenant.

HARVARD LAW SCHOOL LIBRARY.

nant *. And indeed this is neceſſary in England, where it is not the practice to take the land itſelf in execution. But of this afterward.

It was neceſſary to explain at large the privilege that landlords have at common law to force payment of their rents; becauſe it is a fundamental doctrine with relation to the preſent ſubject. I now proceed to conſider the caſe of a creditor who hath obtained a ſecurity upon land for debt due to him. Lord Stair obſerves †, that the Engliſh diſtinguiſh rent into rent-ſervice, rent-charge, and rent-ſeck. *Rent ſervice* is that which is due by the *Reddendo* of a charter of land, ſuch as a feu or blench duty. *Rent-charge* is that which is given by the landlord to a creditor, containing a clauſe of diſtreſs impowering the creditor to diſtrain the land at ſhort hand for payment of the debt ‡. A deed of the ſame nature without a clauſe of diſtreſs, is termed *Rent ſeck*.

A rent charge muſt be completed by the writ alone without poſſeſſion; becauſe the creditor, till intereſt be due, cannot lawfully take poſſeſſion, or levy rent. And it is evident, that poſſeſſion cannot be neceſſary to eſtabliſh a right upon land, while ſuch right admits not of poſſeſſion.

* See 2d William and Mary, cap. 5.

† Inſtitut. p. 268.

‡ New abridgement of the law, tit. *Annuity and Rent-charge*.

ſeſſion. A rent-ſeck is in a different caſe, as may appear from the following conſiderations. The tenants are not perſonally liable to the creditor; and the deed, which contains no clauſe of diſtreſs, affords no title to take payment from them. If therefore they be unwilling to pay their rents to the creditor, he has no remedy but a perſonal action againſt the granter of the deed. A tenant, it is true, acknowledging a rent-ſeck, by delivering but a ſingle penny in part payment, puts the creditor in poſſeſſion of levying rent; after which, if the tenant refuſe to pay, it is conſtrued a diſſeiſin, to entitle the creditor to an aſſize of nouvel diſſeiſin *. But before ſeiſin or poſſeſſion ſo had by the creditor, I ſee not that in any ſenſe the rent-ſeck can be conſtrued a real right. A hypothec is a real right, becauſe the creditor can ſell the land if the debtor fail to make payment. A rent-charge is a real right, becauſe the creditor can levy rent when his term of payment comes. But no right can be conceived to be real, or a branch of property, which gives the creditor no power whatever over the land. And upon this account, if the land be ſold before a creditor in a rent ſeck is acknowledged by the tenants, the purchaſer, I preſume, will be preferred.

I have juſt now hinted at the means for recovering payment, afforded by law to the creditor

* Jacob's Law-dictionary, tit. *Rent*.

ditor in a rent-ſeck. The creditor in a rent-charge, ſtanding on the ſame footing with the landlord, hath a much eaſier method. Where the rent payable to the landlord is a certain quantity of the fruits of the ground, the creditor lays hold of the rent at ſhort hand, which concludes the proceſs with reſpect to the tenant. The operation is not altogether ſo ſimple in caſe of money-rent. The creditor in this caſe lays hold of any goods upon the land, corn or cattle, conſidered as the landlord's property: But then, as the goods diſtrained belong in reality to the tenant, free of all embargo as ſoon as the rent is paid, the tenant is entitled to repledge the ſame, or to demand reſtitution, upon making payment of the rent, or giving ſecurity for it. The creditor in thus diſtraining for obtaining payment, has not occaſion for a decree; nor is it even neceſſary that he diſtrain in preſence of an officer of the law. But this form, though eaſy in one reſpect to the creditor as well as to the landlord, is not however effectual to draw payment, unleſs the tenant concur by repledging and ſubſtituting ſecurity in place of the goods. If the tenant be unable to find a ſurety, or perverſely neglect his intereſt, there was no remedy till the 2d of William and Mary, cap. 5. by which it is enacted, "That in caſe the tenant "or owner of the goods, do not within five "days replevy the ſame with ſufficient ſecurity

"for

" for the rent, the creditor ſhall have liberty to " ſell for payment of the rent." Thus the form of diſtraining upon a rent-charge was made compleat: But a rent ſeck remained a very precarious ſecurity, for the reaſons above-mentioned, till the 4th George II. cap. 28. by which it is enacted " That the like remedy by diſtreſs, " and by impoinding and ſelling the goods, " ſhall be in the caſe of rent-ſeck, that is pro- " vided in the caſe of rent reſerved upon leaſe."

That a power to ſell the goods diſtrained, ſo neceſſary to make rent effectual, was not introduced more early, muſt appear ſurpriſing. But the Engliſh are remarkably addicted to old uſages. Another thing is not leſs ſurpriſing in this form of execution, for which no remedy is provided, that it may be followed out by private authority, when in all other civilized countries execution is not truſted to any but the officers of the law.

I have another obſervation to make upon this ſubject, That in the infancy of government ſhorter methods are indulged to come at right, than afterward when, under a government long ſettled, the obſtinacy and ferocity of men are ſubdued, and ready obedience is paid to eſtabliſhed laws and cuſtoms. By the Roman law, a creditor could ſell his pledge at ſhort hand. With us, of old, a creditor could even take a pledge at ſhort hand; and which was worſe than

than either, it was lawful for a man to take revenge at his own hand for injuries done him *. None of these things, it is presumed, are permitted at present in any civilized country, England excepted, where the ancient privilege of forcing payment at short hand, competent to the landlord and to the creditor by a rent-charge, is still in force.

And now to come to our own securities upon land for payment of debt, we find, in the first place, That originally our law was the same with that of England, as to the form of making rent-services effectual, viz. taking a distress at short hand, to be repledged by the tenant on finding security for the arrears. We have regulations laid down as to the method of taking a distress: the goods must remain in the same barony till they be repledged, or in the next adjacent barony, and within the same sheriffdom, but not in castles or fortalices †; regulations which obviously are borrowed from 52d Henry III. cap. 4. In the next place, When we consider that the system of our laws and government is fundamentally the same with that of England, and that nothing is more natural than to adopt the manners and customs of a more potent neighbour, it is extremely probable, that a rent-charge was in practice here as well as in England. Luckily we have direct evidence

* See Tract 1. † First. Stat. Robert I. cap. 7.

evidence of the fact. Several of these securities are preserved to this day; though they have been long out of use, having given place to what is called *an infeftment of annualrent*, a land security established in the feudal form. Copies of two rent-charges are annexed *; one by Simon Lockhart of Lee, by which, for a certain sum delivered to him, "he grants and sells to "William de Lindsay rector of the church of "Ayr, ten pounds Sterling yearly rent, to be "taken out of the lands of Caitland and Lee; "binding himself and his heirs to pay the said "annuity at two terms in the year Pentecost "and Martinmas; and binding the above lands "of Caitland and Lee, with all the goods and "chattles upon the same, to a distress, at the "instance of the said William Lindsay, his "heirs and assignees, in case he (the granter) "and his heirs shall fail in payment." This bond is dated in the year 1323. The other is a bond of borrowed money for L. 40, dated anno 1418, by James Douglas Lord Baveny to Sir Robert Erskine Lord of that Ilk, in which the debtor becomes bound, "That all the "lands and barony of Sawlyn shall remain with "the creditor, with all freedoms, eases, and "commodities, courts, plaints, and escheats, "till he the creditor, his heirs, executors, and "assignees, be fully paid of the said sum. And "failing

* App. No. 3.

" failing payment out of the ſaid lands of Saw-
" lyn, the debtor obliges and binds all his
" lands of the lordſhip of Dunſyre, to be diſ-
" trained, as well as the lands of Sawlyn, at
" the will of the creditor, his heirs or aſſig-
" nees, till they be paid of the forementioned
" ſum; in the ſame manner that he or they
" might diſtrain their proper lands for their
" own rents, without the authority of any
" judge, civil or eccleſiaſtical."

The bond laſt mentioned is a happy inſtance, as it affords irrefragable evidence, that a rent-charge in this country, was in all reſpects the ſame as in England; and particularly, that the creditor enjoyed that ſingular privilege of the landlord, to diſtrain at ſhort hand without the authority of a judge. It ſerves at the ſame time to explain the above-mentioned regulations of Robert I. and of Robert III. about poinding, which, from analogy of the law of England, and from the poſitive evidence of this deed, muſt appear now to relate to perſonal debts only, and by no means to rent-charges more than to rent-ſervices (2).

Whether

(2) A clauſe burdening a diſpoſition of land with a ſum to a third party, is, in our practice, made effectual by poinding the ground. A right thus eſtabliſhed reſembles greatly a rent-charge. The power which in this caſe the creditor hath to poind the ground, can have no other

Whether our law be improved by ſubſtituting an infeftment of annualrent in place of a rent-charge, may be doubted. I propoſe to handle this ſubject at leiſure, becauſe it is curious. While land was held as a proper benefice for ſervices performed to a ſuperior, the whole forms relating to ſuch a grant, and the whole caſualties due to the ſuperior, were agreeable to the nature of the tenure: But when land returned to be a ſubject of commerce, and, like moveables, to be exchanged for money, forms and caſualties, ariſing from the feudal connection between the ſuperior and vaſſal, could regularly have no place in theſe new tranſactions, with which they were inconſiſtent in every reſpect. When a man makes a purchaſe of land and pays a full price, the purpoſe of the bargain is, That he ſhall have the unlimited property, without being ſubjected in any manner to the vender: And yet ſuch is the force of cuſtom, that titles muſt be made up in the feudal form, becauſe no other titles to land were in uſe. And thus the purchaſer, contrary to the nature of the tranſaction, was metamorphoſed into a vaſſal, and conſequently ſubjected to homage, fealty, non-entry, liferent-eſcheat, &c. upon account of that very land which he purchaſed with

other foundation to reſt on than a clauſe of diſtreſs, which is expreſſed in a rent-charge, and is implied in the right we are ſpeaking of.

with his own money. Such an inconſiſtency, it is true, could not long ſubſiſt; and form by degrees yielded to ſubſtance. When land came univerſally to be patrimonial, and no longer beneficiary, the forms of the Feudal law indeed remained, but the ſubſtance wore out gradually. This change produced blench duties, an eluſory ſum for non-entry in place of the full rents, collateral ſucceſſion without limitation; and failing heirs, the King, and not the ſuperior, as laſt heir: Which regulations, with many others upon the ſame plan, are wide deviations from any tenure that in a proper ſenſe can be termed beneficiary. When the ſubſtantial part of the Feudal law has thus vaniſhed, it is diſmal to lie ſtill under the oppreſſion of its forms, which occaſion great trouble and expence in the tranſmiſſion of land-property.

Our forefathers, however, in adhering to the feudal forms after the ſubſtance was gone, merit leſs cenſure than at firſt ſight may appear juſt from the foregoing deduction. So many different perſons were connected with the ſame portion of land, ſtages of ſuperiors being commonly interjected betwixt the vaſſal in poſſeſſion and the crown, that in moſt inſtances it would have been difficult to throw off the feudal holding, and to make the right purely allodial. This affords a ſufficient excuſe for not attempting early to ſet land free from feudal titles. And

when

when time diſcovered that the feudal forms could be ſqueezed and moulded into a new ſhape, ſo as to correſpond in ſome meaſure with a patrimonial eſtate, it is not wonderful that our forefathers acquieſced in the forms that were in uſe, improper as they were.

But it will be a harder taſk to juſtify our forefathers for deſerting the eſtabliſhed form of a rent-charge, ſubſtituting in its place an infeftment of annualrent, than which nothing in my apprehenſion can be more abſurd. For here a man, who hath no other intention but to obtain a real ſecurity for his money, is tranſformed, by a ſort of hocus-pocus trick, into a ſervant or vaſſal, either of his debtor or of his debtor's ſuperior. And to prevent a miſtake, as if this were for the ſake of form only, I muſt obſerve, that the creditor is even held to be a military vaſſal, bound to ſerve his ſuperior in war; if the contrary be not ſpecified in the bond *. The ſuperior again, after the creditor's death, was entitled to the non-entry duties; and it required an act of parliament † to correct this glaring abſurdity. It muſt be confeſt to be ſomewhat ludicrous, that the heir of a creditor, acting for form's ſake only the part of a vaſſal, and by the nature of his right bound neither for ſervice nor duty to his imagined ſuperior, ſhould yet be puniſhed with the loſs of the

* Stair, p. 268. † Act 42. parl. 1690.

the intereſt of his money for neglecting to enter heir, which might be hurtful to himſelf, but could not in any meaſure hurt his debtor acting the part of a ſuperior. In a word, it is impoſſible to conceive any form leſs conſiſtent with the nature and ſubſtance of the deed to which it relates, than an infeftment of annualrent is. The wonder is, how it ever came to be introduced in oppoſition to the more perfect form of a rent-charge. I can diſcover no other cauſe but one, which hath an arbitrary ſway in law as well as in more trivial matters, and that is the prevelancy of faſhion. We had long been accuſtomed to the Feudal law, and to conſider a feudal tenure as the only compleat title to land: No man thought himſelf ſecure with a title of any other ſort: Juriſdictions and offices muſt be brought under a feudal tenure; and even creditors, influenced by the authority of faſhion, were not ſatisfied till they got their ſecurities in the ſame form.

And this leads me to another abſurdity in the conſtitution of an annualrent-right, leſs conſpicuous indeed than that mentioned; and that is the order or precept to introduce the creditor directly into poſſeſſion; though, by the nature of his right, and by expreſs paction, he is not entitled to take poſſeſſion, or to levy rent, till the firſt term's intereſt become due. Seiſin, it is true, is but a ſymbolical poſſeſſion; but then,

as

as ſymbolical poſſeſſion was invented to ſave the trouble of apprehending poſſeſſion really, it is improper, nay it is abſurd, to give ſymbolical poſſeſſion before the perſon be entitled to poſſeſs. A ſeiſin indeed will be proper after intereſt becomes due: But a ſeiſin at that time is unneceſſary; becauſe the creditor can enter really into poſſeſſion by levying rent; and ſurely real poſſeſſion can never be leſs compleat than ſymbolical poſſeſſion.

It tends not to reconcile us to an infeftment of annualrent, that, conſidered as a commercial ſubject, it is not leſs brittle than deformed. In its tranſmiſſion as well as eſtabliſhment, it is attended with all the expence and trouble of land-property, without being poſſeſſed of any advantage of land-property. It is extinguiſhed by levying rent, by receiving payment from the debtor, and even by a voluntary diſcharge. In ſhort, a perſonal bond is not extinguiſhed with leſs ceremony. This circumſtance unqualifies it for commerce; for there is no ſafety in laying out money to purchaſe it. Nor does the ſymbolical poſſeſſion by a ſeiſin give it any advantage over a rent-charge. The ſeiſin does not publiſh the ſecurity: Regiſtration is neceſſary; and a rent-charge, which requires not infeftment, is as eaſily recorded as a ſecurity eſtabliſhed by infeftment.

To compleat this ſubject, it is neceſſary to take a view of the execution that proceeds upon an infeftment of annualrent; and comparing it with the ancient form of execution upon a rent-charge, to remark where they agree, and where they differ. In the firſt place, the creditor in a rent-charge could not bring an action of debt againſt the tenants for their rents. His claim properly lay to the goods upon the land, which he was entitled to carry off, and to detain till the rent was paid to him. The law ſtands the ſame to this day as to the perſonal action ariſing from an infeftment of annualrent. This ſecurity binds not the tenants to pay to the creditor; He has no claim againſt them perſonally for their rents, unleſs there be in the deed an aſſignment to the mails and duties *.

But in the following particulars, execution upon an infeftment of annualrent, or other *debitum fundi*, differs from execution upon a rent-charge. Firſt, An infeftment of annualrent has not been long in uſe; and at the time when this ſecurity was introduced, more regularity and ſolemnity were required in all matters of law than formerly. Poinding could not now proceed upon a perſonal debt, till firſt a decree was obtained againſt the debtor; and an infeftment of annualrent, if it did not contain an aſſignment

* Durie, 24th March 1626, Gray *contra* Graham; Fountainhall, 5th July 1701, Kinloch *contra* Rochead.

aſſignment to mails and duties, afforded not an action againſt the tenants. Some other form therefore was neceſſary, more ſolemn than that of poinding by private authority. The form invented was to obtain the King's authority for poinding the ground, which was granted in a letter under the ſignet, directed to meſſengers, &c. I diſcover this to have been the practice in the time of our James V. or VI. it is uncertain which; for the letter is dated the 30th year of the reign of James, and no other king of that name reigned ſo long *. But with reſpect to the landlord's privilege of diſtraining the ground, it being afterward judged neceſſary, that a decree, in his own court at leaſt, ſhould be interpoſed, the form was extended to an infeftment of annualrent. There was indeed ſome difficulty in what manner to frame a libel or declaration, conſidering that the creditor has not a perſonal action againſt the tenants, and can conclude nothing againſt them that has the appearance of a proceſs. This difficulty is removed, or rather diſguiſed: The landlord and his tenants are called; for there can be no proceſs without a defendant: There is alſo a ſort of concluſion againſt them, very ſingular indeed, viz. "The ſaids defenders to hear and "ſee letters of poynding and appriſing, direct-"ed by decreet of the ſaid Lords, for poynding

* See a copy of this letter in the Appendix, No 4.

" the readyeſt goods and gear upon the ground " of the ſaid lands," &c. A decree proceeding upon ſuch a libel or declaration, if it can be called a decree, is in effect a judicial notification merely to the landlord and his tenants, that the creditor is to proceed to execution. In a word, the ſingular nature of this decree proves it to be an apiſh imitation of a decree for payment of debt; without which, as obſerved above, poinding for perſonal debt cannot proceed.

In the ſecond place, The property of the goods diſtrained was not by the old form tranſferred to the creditor: The tenant might repledge at any time, upon paying his rent to the creditor, or finding ſurety for the payment. I have no occaſion here to take notice of the Engliſh ſtatute that empowered the creditor to ſell the goods diſtrained; becauſe the rent-charge was laid aſide in Scotland, long before the ſaid remedy was invented. This old form muſt yield to our preſent form of poinding upon *debita fundi*, borrowed from poinding for payment of perſonal debt; which is, that the goods are ſold, if a purchaſer can be found; otherwiſe adjudged to the creditor upon a juſt appretiation. 'Tis to be regretted, that we have dropt the moſt ſalutary branch of the execution, which is that of ſelling the goods. But ſtill, it is more commodious to adjudge the goods to the credi-

tor

tor upon a juſt appretiation, than to make payment depend on the tenant; whereby matters may be kept in ſuſpence for ever.

In the next place, The moſt remarkable difference is, that execution upon a *debitum fundi* is much farther extended than formerly. Of old, execution was directed againſt the moveables only, that were found upon the land; but in our later practice, it is directed both againſt the moveables and againſt the land itſelf, in their order. It appears probable, that this novelty has been introduced, in imitation of execution for payment of perſonal debt, though there is no analogy betwixt them.

This ſubject is an illuſtrious inſtance of the prevalency of humanity and equity, in oppoſition to the rigour of common law. By common law, the creditor who hath a rent-charge or an infeftment of annualrent, may ſweep off the tenant's whole moveables, for payment of the intereſt that is due upon his bond, and is not limited to the arrears of rent. The palpable injuſtice of this execution with regard to the tenant, has produced a remedy; which is, that though goods may be impoinded to the extent of the intereſt due, yet theſe goods may be repledged by the tenant, upon payment of the arrears due by him and the current term. In poinding for payment of perſonal debt, the attaching the tenant's goods even for the current

term, is in diſuſe; and has given place to arreſtment, which relieves the tenant from the hardſhip of paying his rent before the term. The tenant remains ſtill expoſed to this hardſhip, when a decree for poinding the ground is put in execution. But it is unavoidable, at leaſt where the infeftment of annualrent is in the old form, viz. a ſpecies of wadſet containing no perſonal obligation for payment upon which an arreſtment can be founded. In this caſe, there is a neceſſity for indulging the poinding of goods for the current rent; for otherwiſe, ſuppoſing the rents to be punctually paid, there would be no acceſs to the moveables at all. This reſtriction in a poinding of the ground, paved the way for poinding the land itſelf; which was ſeldom neceſſary of old, when the moveables upon the land could be poinded without limitation.

By the *Levari facias* in England, rents payable to the debtor can be ſeized in execution. This being a more ſummary method than arreſtment for attaching rents, is the reaſon, I ſuppoſe, that arreſtment is not uſed in England. For if rents can be thus taken in execution, other debts muſt be equally ſubjected to the ſame execution.

I ſhall conclude with pointing out ſome miſtakes in writers who handle the preſent ſubject. Few things paſſing under the ſame name, differ more

more widely than the two kinds of poinding above-mentioned. Poinding for payment of perſonal debt, proceeds upon a principle of common juſtice, viz. That if a man will not diſpoſe of his effects for payment of his debts, the judge ought to interpoſe, and wreſt them from him. Poinding for payment of debt ſecured upon land, is an exertion of the right of property. The effects are poinded or diſtrained by the landlord's order or warrant; and the execution can reach no effects but what are underſtood to be his property. His property, it is true, is limited, and cannot be exerted farther than to make the claim of debt effectual; and upon that account the tenant may repledge, upon ſatisfying the claim. But if he do not repledge, the effects are in Scotland adjudged to the creditor for his payment, without any reverſion to the tenant; becauſe, in legal execution, matters ought not for ever to be in ſuſpenſe. Hence execution upon perſonal debt is directed againſt the debtor, and the property is transferred from him to his creditor. Execution upon debt affecting land, is directed againſt the land and its product; and transfers not property, but only removes the limitations that were upon the landlord's property, by extinguiſhing the tenant's right of reverſion. Though theſe matters come out in a clear light, when traced to their origin, yet the two poindings are often

confounded by our authors. Lord Stair * mentions the brieve of diſtreſs as the foundation of both ſorts of poinding, and remarks, that by the act 36. parl. 1469, the irrational cuſtom of poinding the tenant's goods without limitation was reſtrained as to both. And he is copied by Mackenzie †. This is erroneous in every particular. The brieve of diſtreſs was nothing elſe but the king's commiſſion to a judge named, to determine upon a certain claim of debt. This brieve entitled the bearer to a decree, ſuppoſing his claim well founded; and conſequently to poind for payment of the ſum decreed. And the act now mentioned, introduceth a regulation which reſpects ſolely the execution upon a debt of this kind; and relates not at all to execution upon debts affecting land.

In the ſame paragraph, the author firſt mentioned adds, That there was no longer any uſe for the brieve of diſtreſs, after the ſaid ſtatute. This muſt be a careleſs expreſſion; for our author could not ſeriouſly be of that opinion. Execution upon perſonal debt after this ſtatute continued as formerly, except that as to tenants it was limited to their arrears including the current term. And with regard to the brieve of diſtreſs conſidered as an authority from the king to judge of perſonal debt, there was a very

* Book 4. tit. 23. § 1.

† Inſtit. book 2. tit. 8. § 14.

very different cauſe for its wearing out of uſe, which is, that judges took upon them to determine upon claims of perſonal debt, without any authority *.

One miſtake commonly produceth another. Our author, taking it for granted, that poinding upon *debita fundi* is regulated by the act 1469, as well as poinding upon perſonal debt, draws the following conſequence †, That there is a reverſion of ſeven years when lands are appriſed upon a *debitum fundi*, as well as when they are appriſed upon a perſonal debt; obſerving at the ſame time, that the extenſion of the reverſion to ten years, by the act 62. parl. 1661, relates to the latter only, and that the former remains upon the footing of the act 1469. It will be evident from what is juſt now ſaid, that apprifings upon *debita fundi* have no reverſion as to land more than as to moveables; the act 1469, which introduced the privilege of a reverſion, relating only to execution for payment of perſonal debt.

This author is again in a miſtake, when he lays down, That appriſing of land upon a *debitum fundi* is laid aſide, and that the land muſt be adjudged by a proceſs before the court of ſeſſion ‡.

It

* See as to this point, Tract 8. Of Brieves.

† Book 4. tit. 23. § 8.

‡ Book 4. tit. 23. § 8. tit. 35. § 27. tit. 51. § 2. and 13.

It is clear, that the act 1672, introducing adjudications, goes not one ſtep farther, than to ſubſtitute them in place of appriſings for payment of perſonal debt; and therefore, that execution upon a decree for poinding the ground, remains to this day upon its original footing.

TRACT

TRACT V.

Privilege of an HEIR-APPARENT in a Feudal Holding to continue the Poſſeſſion of his ANCESTOR.

CUJACIUS gives an accurate definition of a feudal holding in the following words: "Feudum eſt jus in praedio alieno, in perpe-"tuum utendi, fruendi, quod pro beneficio "dominus dat ea lege, ut qui accipit, ſibi fidem "et militiae munus, aliudve ſervitium exhi-"beat *." The feudal contract is diſtinguiſhed from others, by the following circumſtance, That land is given for ſervice, inſtead of wages in money. This contract at its dawn was limited to a time certain. It was afterward made to ſubſiſt during the vaſſal's life; and in progreſs of time was extended to the male iſſue of the original vaſſal. It was not the purpoſe of this contract to transfer the property, but only to give the vaſſal the profits of the land during his ſervice; or, in other words, to give him the uſufruct. To transfer the property would have been inconſiſtent with the nature of the covenant;

* Ad lib. 1. Feud. tit. 1. § 10.

nant; becauſe wages ought not to be perpetual, when the ſervice is but temporary. Hence it neceſſarily followed, when the male iſſue of the original vaſſal called to the ſucceſſion, were exhauſted, that the land returned to the ſuperior, to be employed by him, if he pleaſed, for procuring a new vaſſal. And the effect was the ſame, when any of theſe heirs refuſed in his courſe to undertake the ſervice. Such being the nature and intendment of the feudal contract, it is evident, that while a feu was for life only, it was the ſuperior's privilege as proprietor, without any formality, to enter to the poſſeſſion of the land upon the death of his vaſſal. Nor was this privilege loſt by making feus hereditary. Every heir hath a year to deliberate, whether it will be his intereſt to undertake the ſervice. During this period, being entitled to no wages ſince he ſubmits not to the ſervice, the poſſeſſion and profits of the land muſt of courſe remain with the ſuperior. And even ſuppoſing the heir makes an offer of his ſervice without deliberating, he cannot take poſſeſſion at ſhort hand, of land which is not his own. It is neceſſary, from the nature of the thing, that the ſuperior, accepting his offer, give orders to introduce him to the land; and this act is termed *renovatio feudi*.

This is not the only caſe, where the ſuperior is entitled to an *interim* poſſeſſion. A young man

man is held not capable to bear arms, till he be twenty-one years compleat; and for that reaſon, the heir of a military vaſſal, while under age, is not entitled to poſſeſs the land. The ſuperior, during that interval, holds the poſſeſſion and reaps the profits; for a ſervant has not a claim to wages, while he is incapable to do duty.

Bating theſe interruptions of poſſeſſion preparatory to the heir's entry, which at the ſame time are caſual and for the moſt part momentary, the vaſſal and his male deſcendents continue in poſſeſſion, and enjoy the whole profits of the land. When a vaſſal dies, the eſtate deſcends to his heir, and from one heir to another in a long train. But poſſeſſion and enjoyment, which are ouvert acts, and the moſt beneficial exertions of property, make a ſtrong impreſſion on the vulgar; and naturally produce a notion, that the land belongs in property to the family in poſſeſſion. Hence it came that the property, or the moſt beneficial part of it, was in popular eſtimation transferred from the ſuperior to the vaſſal. The intermiſſion of military ſervice in times of peace, favoured this notion; which at laſt, through the influence of general opinion, was adopted by the legiſlature.

This heteroclite notion of the property being ſplit into parts, and the moſt ſubſtantial part transferred to the vaſſal, produced another, viz. that

that after the vaſſal's death, the heir, and not the ſuperior, is entitled to poſſeſs the land. This notion prevailed ſo much, as to procure in England a law during the reign of Henry II. which ſhall be given in the words of a learned author *. "If any one ſhall die holding a "frank pledge (*i. e.* having a free tenure), let "his heirs remain in ſuch ſeiſin, as their father "had on the day he was alive and died, of his "fee, and let them have his chattels, out of "which they may make alſo the deviſe or par-"tition of the deceaſed (that is, the ſharing of "his goods according to his will), and after-"wards may require of their lord, and do for "their relief and other things, which they "ought to do as touching their fee, (*i. e.* in "order to their entering upon the eſtate.)" This law was undoubtedly intended for the benefit of thoſe only who were of full age, capable of the ſervices which a vaſſal in poſſeſſion is bound to perform. For it would be abſurd, that an heir under age, who is incapable of doing ſervice, ſhould notwithſtanding be entitled to the wages. Glanvil, who wrote in this King's reign, makes the diſtinction, but without referring to any ſtatute †. And we have Bracton's authority for the ſame ‡.

That

* Selden's Janus Anglorum, chap 17.

† L. 7. cap. 9. l. 9. cap. 4. ‡ L. 4. p. 252.

That the king's vaſſals were not comprehended under this regulation, is evident from the ſtatute 52d Henry III. cap. 16. where a diſtinction is made betwixt the king's vaſſals and thoſe who hold of a ſubject. The firſt ſection of this ſtatute declares it to be law, That the heir-apparent, in land held of a ſubject, is entitled to continue the poſſeſſion of his anceſtor; and provides certain remedies againſt the ſuperior who endeavours to exclude the heir from poſſeſſion. "If any heir, after the death of his "anceſtor, be within age, and the lord have "the ward of his lands and tenements, if the "lord will not render unto the heir his land "(when he cometh to full age) without plea, "the heir ſhall recover his land by aſſize of "mortanceſtor, with the damages he hath ſuſ-"tained by ſuch with-holding, ſince the time "that he was of full age. And if an heir, at "the time of his anceſtor's death, be of full "age, and he is heir-apparent, and known for "heir, and he be found in the inheritance, the "chief lord ſhall not put him out, nor take nor "remove any thing there, but ſhall take only "ſimple ſeiſin therefor, for the recognition of "his ſeigniority, that he may be known for "lord. And if the chief lord do put ſuch an "heir out of the poſſeſſion maliciouſly, where-"by he is driven to purchaſe a writ of mort-"anceſtor, or of couſenage, then he ſhall reco-

"ver

" ver his damages, as in aſſize of nouvel diſ-
" ſeiſin." Here we find it clearly laid down, that the heir, being of full age, is entitled to continue the poſſeſſion of his anceſtor, and that the ſuperior is entitled to ſimple ſeiſin only, by which is meant the relief *. And it is equally clear, that though the ſuperior is entitled to poſſeſs the land, while the heir of his military vaſſal is under age; yet that this heir, arriving at full age, is entitled to recover the poſſeſſion, without neceſſity of a ſervice or any other formality; evident from this, that if the ſuperior be refractory, the heir has a direct remedy by an aſſize of mortanceſtry, which is a ſpecies of the aſſize of nouvel diſſeiſn.

But the ſecond ſection of this ſtatute is in a very different ſtrain. The words are, " Touch-
" ing heirs which hold of our Lord the King
" in chief, this order ſhall be obſerved, That
" our Lord the King ſhall have the firſt ſeiſin
" of their lands, likeas he was wont to have
" beforetime. Neither ſhall the heir, or any
" other, intrude into the ſame inheritance, be-
" fore he hath received it out of the King's
" hands, as the ſame inheritance was wont to
" be taken out of his hands and his anceſtors
" in time paſt. And this muſt be underſtood
" of lands and fees, the which are accuſtomed
" to be in the King's hands, by reaſon of
" knight's

* Coke, 2 Inſtit. 134.

" knight's ſervice, or ſerjeantry, or right of pa-
" tronage." Here we ſee the old law preſer-
ved in force, as to the king's military vaſſals, that they have no title to continue the poſſeſſion of their anceſtors; that after the death of ſuch a vaſſal, the poſſeſſion returns to the king as proprietor; and that the heir cannot otherwiſe attain the poſſeſſion, but by a brieve from the chancery. The difference here eſtabliſhed, betwixt the king's military vaſſals and thoſe who hold of ſubjects, is put beyond all doubt by the ſtatute 17th Edward II. cap. 13. " When any
" (that holdeth of the King in chief) dieth, and
" his heir entereth into the land that his ance-
" ſtor held of the king the day that he died,
" before that he hath done homage to the
" King, and received ſeiſin of the King, he ſhall
" gain no freehold thereby; and if he die ſeiſed
" during that time, his wife ſhall not be endow-
" ed of the ſame land; as it came late in ure
" by Maud, daughter to the Earl of Hereford,
" wife to Maunſel the marſhal, which, after the
" death of William Earl Marſhall of England
" his brother, took his ſeiſin of the caſtle and
" manour of Scrogoil, and died in the ſame
" caſtle, before he had entered by the King,
" and before he had done homage to him:
" whereupon it was agreed, that his wife ſhould
" not be endowed, becauſe that her huſband
" had not entered by the King, but rather by

" intruſion. Howbeit this ſtatute doth not " mean of ſoccage and other ſmall tenures." We have no reaſon to doubt, that this ſtatute, concerning the king's military vaſſals, continued in force till the 12th Charles II. cap. 24. when military tenures, of whomever held, were aboliſhed.

It appears from our law-books, that the privilege beſtowed upon heirs by the ſtatute of Henry II. of continuing the poſſeſſion of their anceſtors, obtained alſo in Scotland *. This privilege made a great change in the form of feudal titles; and in particular, with reſpect to land held of a ſubject, ſuperſeded totally the brieve of inqueſt, and the conſequential ſteps of ſervice and retour. For where an heir is privileged by law to continue or apprehend at ſhort hand the poſſeſſion of his anceſtor, he has no occaſion for a ſervice and retour, of which the only purpoſe is to procure poſſeſſion. We followed alſo the Engliſh law with reſpect to military tenures held of the king. The 2d ſtatute Robert I. cap. 7. which is our authority, is copied almoſt *verbatim* from the ſtatute of Henry III. above mentioned. But we did not reſt there; for we ſee from the ſtatutes of Robert III. † that the old law was totally reſtored, entitling

* Reg. Maj. I. 2. cap. 40. cap. 71. § 1.; Second ſtat. Rob. I. cap. 6. § 1. 2. 3. † Cap. 19. and 38.

tling every ſuperior to the poſſeſſion at the firſt inſtance, and leaving the heir to claim the poſſeſſion from his ſuperior.

But the authority of theſe ſtatutes was not ſufficient to ſtem altogether the torrent of popular opinion. By this time, the property, in common apprehenſion, was transferred from the ſuperior to the vaſſal; and after the vaſſal's death, his heir, it was thought, had a better title than the ſuperior to poſſeſs the land. The general bias accordingly, in ſpite of theſe ſtatutes, continued in favour of the heir's poſſeſſion; and an additional circumſtance had great weight in his favour: a young man *in familia*, is conſidered as in poſſeſſion even during his father's life; and after his father's death, there is no change with regard to him: he has no occaſion to apprehend poſſeſſion: he remains or continues in it, and cannot be thruſt out at ſhort hand without ſome ſort of proceſs. Nor in a favourite point were our forefathers nice in diſtinguiſhing betwixt heirs. If a ſon *in familia* was entitled to continue in poſſeſſion, it was reckoned no wide ſtretch, that a ſon *foriſfamiliated* ſhould be entitled to ſtep into the poſſeſſion: nor was it reckoned a wide ſtretch to communicate this privilege to other heirs, though leſs connected with the anceſtor. Thus, as to the mere right of poſſeſſion, the heir in Scotland has, for many centuries, been prefer-

red before the ſuperior. I muſt obſerve, however, that this privilege, acquired by cuſtom againſt the authority of ſtatute-law, has not the effect to veſt the property in the heir, nor to give him a freehold, as termed in England. This would be to overturn the ſtatute altogether, which we have not attempted. The ſtatute is ſo far only encroached upon in practice, as to privilege the heir to ſtep into the void poſſeſſion; reſerving the ſuperior's privilege to turn him out of poſſeſſion by a proper proceſs, unleſs he make up his title by a ſervice, and demand regularly poſſeſſion or ſeiſin from the ſuperior.

The difference then betwixt our preſent practice, and what it was before the days of Henry II. appears to be what follows. The heir originally had no right to poſſeſs, till he was entered by the ſuperior. If the heir entered at his own hand, he was guilty of intruſion, and could be ſummarily ejected. At preſent we conſider, as originally, the land to be the ſuperior's property, and that the heir has not a freehold till he be regularly entered: but then we conſider him as entitled, at the firſt inſtance, to the poſſeſſion; that his poſſeſſion is lawful; and that the ſuperior cannot turn him out at ſhort hand or by a ſummary ejection, but muſt inſiſt in a regular proceſs of removing, after a declarator of non-entry is obtained.

From

From what is above laid down, it is evident, that in no caſe have we adopted the Engliſh maxim, *Quod mortuus ſaſit vivum.* Formerly the Engliſh law, with regard to military tenures held of the crown, was the ſame with what obtains here in all tenures, viz. That the heir has no freehold, till he ſue out his livery, after a ſervice upon the brieve *Diem clauſit ſupremum*, which correſponds to our brieve of inqueſt. But now that in England military tenures are aboliſhed, heirs require not ſervice and infeftment; the maxim holds univerſally there as in France, *Quod mortuus ſaſit vivum.*

It may be thought at firſt view, a very ſlight favour to prefer the heir *in poſſeſſorio*, when it requires only a proceſs to thruſt him out of poſſeſſion. But not to mention that he has a defence at hand, which is an offer to enter heir, it belongs more to the preſent ſubject to obſerve, that this privilege of poſſeſſion is attended with very remarkable advantages, ariſing from the bias of popular notions to which the law hath ſubmitted. The ſuperior is entitled to a year's rent in name of relief, or *primer ſeiſin* as termed in England; and if the ſuperior were entitled to the poſſeſſion, this relief would be the full rent. But by the heir's privilege of poſſeſſion, the ſuperior for the year's rent is reduced to a claim; and this claim, like all other caſualties of ſuperiority, being unfavourable, is meaſured

by the new extent; which, by conſtruction of law, or rather of practice, is in this caſe held to be the rent of the land. And the ſame rule is obſerved in the claim of non-entry. This claim of non-entry alſo is founded upon the ſuperior's legal privilege of poſſeſſion. The rents claimed are underſtood to be the rents of the ſuperior's land, levied by the heir without a title, and for which therefore he is bound to account. But the burden of accounting is made eaſy to him, the new extent being in this caſe, as in the former, put for the real rent.

There is ſcarce one point in our law ſo indiſtinctly handled by writers, and upon which there is ſuch contrariety of deciſions, as the following, What right an heir poſſeſſed of his anceſtor's eſtate has to the rents, before he is infeft. In many caſes it has been judged, that the rents are his, in the ſame manner as if he were regularly entered. In other caſes, not fewer in number, it has been judged, that tenents paying their rents to him *bona fide* are ſecure; but that he has no legal claim to the rents, and therefore has no action againſt the tenants to force them to pay. Purſuant to the latter opinion, the growing rents, after the predeceſſor's death, have been conſidered as a part or acceſſory of the *hereditas jacens*, and therefore to be carried by an adjudication deduced againſt the heir, upon a ſpecial charge to enter

enter *: and yet it weighs on the other ſide, that an appriſing upon a ſpecial charge was never thought to carry bygone rents; for a good reaſon, which applies equally to an adjudication, viz. That an appriſing upon a ſpecial charge ought not to have a more extenſive effect, than an appriſing deduced againſt the heir after he is infeſt, which aſſuredly doth not carry any arrears. To relieve from this uncertainty, we muſt ſearch for ſome principle that may lead to a juſt concluſion.

The ſuperior, during the heir's non-entry, is undoubtedly proprietor of the land. Hence it follows, that at common law the rents belong to the ſuperior, and that the heir in poſſeſſion is liable to account to him for the rents. But our law, or rather our judges, indulging the general prepoſſeſſion in favour of the heir, have been long in uſe of limiting this claim to the new extent, which once having been the full rent of the land, is preſumed to continue ſo, in order to relieve the heir from a rigorous claim. What then is to become of the difference betwixt this ſuppoſed value of the rents, and what they extend to in reality? This difference muſt undoubtedly remain with the heir, as what he gains from the ſuperior, by the favour of the

* 13th February 1740, Dickſon of Kilbucho *contra* Apparent-heir of Poldean.

law. Let us ſuppoſe a declarator of non-entry is commenced, which entitles the ſuperior, in equity as well as at common law, to the full rents; and that upon a tranſaction with the heir, he accepts of the one half: the other half muſt belong to the heir by this tranſaction. It ought to be the ſame before a declarator; for a legal compoſition has the ſame effect with one that is voluntary. This reaſoning appears to be ſolid; and therefore we need not heſitate to conclude, that the heir in poſſeſſion is entitled to levy the rents, in order to account for the ſame to the ſuperior, according to the new extent before declarator, and according to the full rents after. And indeed, without a circuit, the power of levying the rents may reaſonably be thought a neceſſary conſequence of the right of poſſeſſion; for without it poſſeſſion is a mere ſhadow.

This point being eſtabliſhed, there no longer remains any doubt. If the heir apparent, ſeizing the poſſeſſion or continuing the poſſeſſion of his anceſtor, have right to the rents without a formal entry, it follows that theſe rents are not to be conſidered as *in hereditate jacente* of the anceſtor, to be carried by an adjudication upon a ſpecial charge. They muſt be attached by arreſtment as the property of the heir-apparent. What of theſe rents remain in the hands of the

tenants

tenants without being levied by the heir-apparent, muſt after his deceaſe belong to his next of kin; and the next heir, though he complete his right to the land by infeftment, will have no claim to theſe rents.

However clear this doctrine may be in principles, it has been much controverted in practice. On the 28th January 1756 Houſton *contra* Nicolſon of Carnock, the executor of the heir apparent was preferred. On the 5th December 1760, Hamilton *contra* Hamilton, the heir was preferred. But upon a ſolemn hearing in preſence, 24th July 1765, Lord Banff *contra* Joaſs, the executor was preferred. By this deciſion, the executor of the heir-apparent in the caſe Hamilton *contra* Hamilton was encouraged to bring an appeal; and the reſult was, to reverſe the judgment of the court of ſeſſion in that caſe, and to prefer the appellant. So that the matter is at laſt juſtly ſettled on the principles above laid down.

This is a curious branch of the hiſtory of the Feudal law in Britain, and of a ſingular nature. The Feudal law was a violent ſyſtem, repugnant to natural principles. It was ſubmitted to in barbarous times, when the exerciſe of arms was the only ſcience and the only commerce. It is repugnant to all the arts of peace, and when mankind came to affect ſecurity more than danger, nothing could make it tolerable,

but

but long uſage and inveterate habit. It yielded to the prevailing love of liberty and independency; and, through all Europe, it dwindled away gradually, and became a ſhadow, before any branch of it was abrogated by ſtatute. When it was undermined by ſo powerful a cauſe, would one imagine that it could ever recover any ground it had once loſt? And yet here is a remarkable inſtance of its recovering ground. This phenomenon muſt have had ſome ſingular cauſe, which probably is now loſt for ever; for we have no regular records of any antiquity, and our ancient hiſtorians ſeldom take notice of civil tranſactions that have any relation to law.

TRACT

TRACT VI.

REGALITIES, and the Privilege of REPLEDGING.

AMONG all the European nations who embraced the feudal ſyſtem, it is remarkable, that the crown vaſſals roſe gradually into power and ſplendor, till they became an over match for the ſovereign. It is ſtill more remarkable, that the ſame crown-vaſſals, thoſe of Germany excepted, after attaining this height of power and ſplendor, ſunk by degrees; and at preſent are diſtinguiſhed from the maſs of the people, by name more than by any ſolid pre-eminence.

The growing power of the crown-vaſſals, may eaſily be accounted for: It was the reſult of making feus hereditary. Experience diſcovered, what might have been diſcovered without experience, that to make the bread of a man's family depend on his life, is apt to damp the braveſt ſpirits. This engaged firſt one prince and then another, to promiſe a renovation of the feu to the heir, if the vaſſal ſhould loſe his life in battle; till theſe engagements became univerſal.

univerſal. The ſovereigns in Europe, having no ſtanding army, could not hope to carry on war ſucceſsfully, without the good-will of their vaſſals; to whom therefore it became neceſſary to give all encouragement and indulgence. If one prince led the way, others were obliged to follow. At length, no powers were to be withheld from the crown-vaſſals, who had already become too powerful. In England, palatinates were erected, exempted from the juriſdiction of the King's judges, with power of coining money, levying war, &c. In Scotland, regalities were created with the higheſt civil and criminal juriſdiction, and with all other powers annexed to palatinates in England.

Whether regalities originally were exempted from the juriſdiction of the King's judges, is uncertain. I incline to think they were not; at leaſt, that it has been a matter of doubt. For there are ſeveral inſtances of grants by the King to lords of regality, exempting them from the juriſdiction of the King's judges; which would be an idle clauſe if all were exempted. One inſtance there is at hand, viz. a charter by King Robert II. to his brother James de Douglas de Dalkeith, Knight, of the baronies of Dalkeith, Caldercleer, Kinclaven, &c. to be held in one entire and free barony, and in free regality, with the four pleas of the crown. This charter is in the 16th year of the King's reign, ſuppoſed

to

to be in the 1386. And in the year immediately following, there is a grant under the great ſeal to the ſame James de Douglas, reciting the ſaid charter, and "diſcharging all the King's juſti-"ciars, ſheriffs, and their miniſters, from all "intromiſſion and adminiſtration of their offices "within the ſaid lands." And it appears by indenture betwixt King Robert I. and his parliament 1326, authoriſing a tax to be levied for the King's uſe during his life, that many of the great lords enjoyed the foreſaid privilege, maintaining, that the King's officers could not act within their lands. And therefore, theſe lords take upon themſelves, to levy what part of the tax was laid upon their lands, and to pay the ſame to the King's officers *. This excluſive privilege, in whatever manner introduced, came to be fully eſtabliſhed in lords of regality, as will appear from the act 5. parl. 1440, and act 26. parl. 1449: the former regulating the juſtice-airs on the north and ſouth ſides of the Scots ſea; and, with the ſame breath, appointing lords of regality to hold juſtice-airs within their regalities: the latter appointing regalities to be ſubjected to the King's juſtice, while they remain in the King's hands.

And here by the way it may be remarked, that the act 43. parl. 1455, is no ſlight inſtance of the authority of the great barons. Thoſe who

* See this indenture in the Appendix, No. 5.

who had obtained regalities, were fond to confine to themſelves the power and privileges depending thereon: And to prevent future rivalſhip, they wreſted from the crown one capital branch of its prerogative, that of erecting regalities; the ſaid act declaring, "That in time "coming no regalities be granted without de-"liverance of parliament;" that is, without conſent of the Lords who had already obtained regalities; for in them was centered the power of the parliament. The circumſtances of thoſe times unfold the political view of this ſtatute; for the public good is a motive of no great influence in rude ages. In Scotland, the great families, by monopolizing the higher powers and privileges, ſecured to themſelves dignity and authority. In England, the ſame ſpirit procured the ſtatute *de don's conditionalibus*; which, by the power of making entails, and attaching unalienably a great eſtate to a great family, laid a ſtill more ſolid foundation for dignity and authority.

The downfal of great families was occaſioned by circumſtances more complex. Theſe are many in number, but the chief appear to be, the transference of property from the ſuperior to the vaſſal, the free commerce of land, and the firm eſtabliſhment of the right of primogeniture. With reſpect to the two circumſtances firſt mentioned, it is a maxim in politics, That power in

a good meaſure depends on property. The great lords originally had great power, becauſe their vaſſals had the uſe only of the lands they poſſeſſed, not the property. But popular notions prevailing over ſtrict law, the vaſſal came to be conſidered as proprietor, and law accommodated itſelf to popular notions. And thus the property of the feudal ſubject was imperceptibly transferred from the ſuperior to his vaſſal; which made the latter in a good meaſure independent. The free commerce of land, repugnant to the genius of the Feudal law, brought the great lords lower and lower. Peace and commerce afforded money, and introduced luxury. The grandees, deſpiſing the frugality of their anceſtors, could no longer confine their expences within their yearly income. They were obliged to diſpoſe of land for payment of their debts; and the induſtrious, who had money, were fond to purchaſe land, which, for the ſake of independency, they choſe to hold of the crown. Thus, by multiplying the crown-vaſſals without end, their connections were broken, and their power reduced to a ſhadow.

While the crown-vaſſals were declining, the crown was gaining ground daily by the privilege of primogeniture. To explain this circumſtance, for it requires explanation, it muſt be obſerved, that in ſucceſſion, primogeniture has no privilege by the law of Nature. And though

a crown may be an exception, where the ſucceſſion is confined to a ſingle perſon; yet primogeniture in this caſe, cannot take faſt hold of the mind, in oppoſition to the general rule of ſucceſſion, which in private eſtates beſtows an equal right on all the males. We ſee a notable example of this in Turkey, where primogeniture has no privilege, except with regard to the imperial dignity. Influenced by the general rule of an equal ſucceſſion, the younger ſons of the Emperor conſider themſelves to be upon a level with the firſt-born; and their title to the empire equal to his. By this means, where one is preferred by will, or the eldeſt where there is no will, the other ſons are apt to pronounce it an act of injuſtice, depriving them of their birthright. Hence perpetual jealouſies and civil diſcord, which commonly terminate in the eſtabliſhment of one of the ſons, at the expence of the lives of his brethren. And conſidering the matter impartially, this is leſs the effect of brutal manners, than of an infirm political conſtitution (1).

From

(1) It was a regulation in Perſia, that the King was obliged to name his ſucceſſor, if he choſe to make war in perſon. Darius had three ſons by the daughter of Gobryas, his firſt wife; all born before he was King. After his acceſſion to the throne, he had four more by Atoſſa, the daughter of Cyrus. Of the former, Artabazanes was the eldeſt: of the latter, Xerxes: and theſe

two

From the hiſtory of Europe we learn, that in the deſcent of the crown, hereditary right was of old little regarded: Nor is this wonderful, conſidering, that till the Feudal law was eſtabliſhed, primogeniture did not beſtow any privilege in point of ſucceſſion. The feudal ſyſtem, by confining to a ſingle heir every feudal ſubject, made way for the eldeſt ſon. Then it was, and no ſooner, that ſucceſſion to the crown, and to private eſtates, were governed by the ſame rules; which gave force to the right of primogeniture, as if it were a law of nature. But as it required many ages to obliterate former notions, and to give that preference to primogeniture which now is never called in queſtion, the crown-vaſſals were in the meridian of power long before the kingly authority had gained much ground. Kings being indebted for their advancement to the will of the people more than to

two were competitors for the ſucceſſion. Artabazanes urged, that he was the eldeſt of all the ſons of Darius, and that by the cuſtom of all nations the eldeſt has right to the crown. On the other hand, it was urged by Xerxes, that he was the ſon of Atoſſa, the daughter of Cyrus, who had delivered the Perſians from ſervitude, and that he was born after Darius was king; whereas Artabazanes was only the ſon of Darius a private man. Theſe reaſons appeared ſo juſt, that Xerxes was declared the ſucceſſor.—*Herodotus, book* 7.——The privilege of primogeniture could not be firmly eſtabliſhed in Perſia, when it gave way to ſuch trivial circumſtances.

to the privilege of blood, they were little better than elective monarchs. But from the time that primogeniture came to be a general law in ſucceſſion, European princes, depending now no longer on the choice of their people, acquired by degrees that extent of power, which naturally belongs to a hereditary monarch. The crown-vaſſals at the ſame time gradually declining by the commerce of land, and by the transference of their property to their vaſſals, are reduced within proper bounds, and have now no power but what tends to ſupport a monarchical government.

Germany is in a ſingular caſe. Compoſed of many great parts, which were never ſolidly united under one government, or under one royal family, it fluctuated many centuries betwixt hereditary and elective monarchy. This advanced the power of the great lords, and reduced the monarchy to be purely elective. The electors became ſovereign princes; and the power of the Emperor is almoſt annihilated.

The juriſdiction of the crown-vaſſals, comparing the preſent with former times, is a beautiful example of this decline. It ſunk gradually with their power and property. What they loſt on the one hand, was on the other acquired by the King and his judges; and at preſent, with the other privileges of crown-vaſſals, their juriſdiction is reduced to an empty name. The extent

of

of this juriſdiction in its different periods, and its gradual abridgment, being chiefly the purpoſe of the preſent eſſay, I find it neceſſary to take a circuit, in order to ſet the matter in its proper light.

As no branch of public police is of greater importance than that of diſtributing juſtice, it is neceſſary that the juriſdiction of every judge be aſcertained, with reſpect to cauſes as well as perſons. Concerning the latter, a plain and commodious rule is eſtabliſhed through moſt civilized nations. The territory is divided into diſtricts; and in each a judge is appointed, who has under his juriſdiction the people reſiding in his diſtrict. Thus, with regard to juriſdiction, the people are diſtinguiſhed by their place of reſidence, which ſo far regulates the powers of the ſeveral judges. And were it poſſible to diſtinguiſh cauſes by a rule equally preciſe, diſputes among judges about their powers would ſcarce ever occur.

But this inſtitution is the reſult of an improved police: Our notions were originally different, and were neceſſarily different. Before agriculture was invented, people in a good meaſure depended on their cattle for ſuſtenance. In theſe early times, the few inhabitants that were in a country, being claſſed in tribes or clans, led a wandering life from place to place, for the convenience of paſture. Every clan or

tribe had a head, who was their general in war, and their judge in peace. And thus every chieftain was the judge over his own people, without regard to territory, which in a wandering ſtate could not be of any conſideration. After the invention of agriculture, which fixed a clan to a certain ſpot, the ſame principle prevailed, and neighbouring clans, to prevent diſputes about juriſdiction, ſettled upon the following regulation, That the people of a clan, where-ever found, ſhould be judged by their own chieftain.

During the third and fourth centuries, we find this regulation ſteadily obſerved in France, after it was deſerted by the Romans and abandoned to the barbarians. It was an eſtabliſhed rule among the Burgundians, Franks, Goths, and ancient inhabitants, That each people ſhould be governed by their own laws, and by their own judges, even after they were intermixed by marriages and commerce. Nor was this an incommodious inſtitution, in a country poſſeſſed by nations or clans, differing in their language, differing in their laws, and differing in their manners. There can be no doubt, that the ſame practice prevailed in this country, both before and after our ſeveral tribes or clans were united under one general head. The laws of the different clans have been digeſted into one general law, known by the name of *The Common law of Scotland*; but the chieftain's privilege

of

of judging his own people, continued long in force, and traces of it remain to this day. Clans were diſtinguiſhed from each other, ſo as to prevent any confuſion in exerciſing the privilege. They differed in their language, or in their dreſs; and when theſe differences were not found, thoſe who lived together and paſtured in common were reckoned to be of one clan. After agriculture was introduced, clans were diſtinguiſhed, partly by a common name, and partly by living within a certain territory.

This regulation was favoured by the Feudal law, which made an additional bond of union betwixt the chieftain and his people, by the relation of ſuperior and vaſſal. And the juriſdiction being thereby connected with land-property, is with reſpect to the title, termed territorial juriſdiction; though, with reſpect to its exerciſe, it is perſonal, without relation to territory. On the other hand, juriſdiction granted by the crown to perſons or families, without relation to land-property, ſuch as an heritable juſticiary or an heritable ſheriffſhip, is perſonal with reſpect to the title, but territorial with reſpect to its exerciſe. The firſt barons were no doubt the chieftains of clans; and the right of juriſdiction ſpecified in the charters of creation, muſt not be conſtructed an original juriſdiction flowing from the king, but the juriſdiction that theſe chieftains enjoyed from the beginning o-

ver their own people. In imitation of theſe firſt barons, every man who got his lands erected into a barony, was held to be a chieftain, or the head of a clan; and the juriſdiction conferred upon him, though depending entirely on the grant, was, by the connection of ideas, conſidered to be the ſame that belonged originally to chieftains. And hence it is, that theſe territorial judges had the power of reclaiming their own people from other judges, and judging them in their own courts.

Upon the ſame principle, the royal boroughs had the power of reclaiming their own burgeſſes, not only from territorial judges, but even from the king's judges *. Pleas of the crown were excepted; becauſe the royal boroughs had no juriſdiction in ſuch crimes †. And here it muſt be remarked, that royal boroughs had a peculiar privilege, neceſſary for preſerving peace, That in proceſſes againſt ſtrangers before the bailies, for a riot or breach of the peace committed within the town, reclaiming to the lord's court was not admitted ‡.

But among a rude people delighting in war, where the authority of the chieftain depends on the good-will of his clan, this privilege was often exerted to protect criminals, inſtead of being

* Leg. Burg. cap. 61. † Ib. cap. 7.
‡ Firſt ſtat. Rob. I. cap. 16. § 3.

ing exerted to bring them to juſtice. Endeavours were early uſed to correct this corrupt practice, by enacting, That a chieftain or baron ſhould be bound to give a pledge or ſurety in the court where the criminal is attached, to do juſtice upon him in his own court within year and day *: and from this time, upon account of the pledge or ſurety given, the privilege of reclaiming obtained the name of repledging.

This regulation, though a wiſe and uſeful precaution, proved but an imperfect remedy. Nor was better to be expected; for the privilege of repledging was an unnatural excreſcence in the body-politic, which admitted of no effectual cure, other than amputation. The ſtatutes of Alexander II. cap. 4. are evidence, that the power of repledging was proſtituted in a vile manner, not only to protect the lord's own men from juſtice, but alſo to protect others for hire. And accordingly, by that ſtatute, and by the firſt ſtatutes Robert I. cap. 10. the power of repledging is confined within narrower bounds than formerly. But this power, after all the limitations impoſed, being found ſtill prejudicial to the common intereſt, an attack was prudently made upon it in its weakeſt part, viz. that of the royal boroughs, which produced the act 1. parl. 1488, ordaining burgeſſes to ſubmit to

* Quon. attach. cap. 8.

trial in the juſtice-air, without power of repledging. And to make this new regulation palatable, it was made the duty of the king's juſtice, to give an aſſize to a burgeſs of his own neighbours, if a ſufficient number were preſent in court.

From what is ſaid above, there can be no doubt that barons had a power of repledging from the king's courts, as well as from each other. The privilege, however, was of no great moment; becauſe every partial judgment of the baron in favour of any of his own people, lay open to immediate redreſs, by an appeal to the king's court. An appeal lay even to the ſheriff, againſt every ſentence pronounced in the baron-court *. In this reſpect the power of repledging that the lords of regality enjoyed, was a privilege of much greater moment; becauſe from a court of regality there lay no appeal but to the parliament.

Lords of regality had undoubtedly the power of repledging, when their people were apprehended out of their territory and brought before another court. And it is the only caſe in which there was occaſion to exerciſe the privilege: for their juriſdiction being excluſive even of the king's courts, none of their people could be legally attached within their territory by an extraneous

* Reg. Maj. l. 1. cap. 3.

extraneous judge; ſuch an attachment would be void as *ultra vires*, and a declarator would be competent without neceſſity of repledging.

The firſt manifeſt ſymptom of the declining power of the crown-vaſſals, was the juriſdiction of the king's courts extended over regalities, ſo as to produce a cumulative juriſdiction. As this privilege was introduced by practice, not by ſtatute, the encroachment was gradual, one inſtance following another, till the privilege was eſtabliſhed. It is probable, that the power of repledging paved the way to this encroachment. For among a rude people, unſkilled in the refinements of law, the encroachment would ſcarce be perceived, while the ſubſtantial prerogative remained with the chieftains, that of judging their own people; and whether that prerogative was maintained by a proper declinator, or by the power of repledging, would be reckoned a mere *punctilio*. The people of a regality, originally exempted from all juriſdiction ſave that of their own lord, were thus imperceptibly ſubjected alſo to the king's courts. But ſtill a regality being co-ordinate with the king's ſupreme courts, its decrees, as formerly, were ſubjected to no review except in parliament.

By the eſtabliſhment of the court of ſeſſion, which is the ſupreme court in civil matters, the regality-courts were rendered ſo far ſubordinate.

But

But in matters criminal, the juriſdiction, as co-ordinate with that of the juſticiary-court, was preſerved entire, together with the power of repledging even from that court *.

The ſovereign courts, acquiring great ſplendor under good government, annihilated the baron's power of repledging. But the lords of regality did not ſo readily ſuccumb under the weight of an enlarged prerogative; and though their privileges were in a great meaſure incompatible with the growing power of the crown, as well as with the orderly adminiſtration of juſtice; yet ſuch was their influence in parliament, that the attempt to rob them of their privileges by an expreſs law, was found not adviſable. It was more prudent, to lie in wait for favourable opportunities to abridge them. The firſt opportunity that offered, reſpected church regalities annexed to the crown after the Reformation. The heritable bailies of theſe regalities being an inconſiderable body and in a ſingular caſe, it was not difficult to obtain a ſtatute againſt them. And accordingly, though their power of repledging from the ſheriff, both in civil and criminal matters, was reſerved entire; yet it was enacted †, "That they ſhould have "no power of repledging from the court of "juſticiary,

* Skene de verb. ſignif. tit. (Iter) § 12.

† Act 29. parl. 1587.

"justiciary, except in the case of prevention by "the first citation:" which was abrogating their privilege of repledging from the justiciary-court. This being a direct attack upon regality-privileges, though in some measure disguised, it was necessary to soften its harshness; which was done by substituting, in place of the power of repledging, a privilege in appearance greater, but in effect a mere shadow. It was, that the heritable bailie might sit with the king's justice and judge with him, and in case of conviction receive a proportion of the escheat.

This statute paved the way for abridging the privileges of laic regalities; as any handle is sufficient against a declining power. The privilege of repledging was however kept alive, though it wore fainter and fainter every day; and at the long-run was indulged for fifteen days only, after the crime was committed. This we learn from the statutes appointing justiciars in the Highlands *, in which the rights and jurisdiction of lords of regality are reserved, and particularly "their right of prevention for fif-"teen days;" importing, That if the person was cited before the justice court within fifteen days of committing the alledged crime, the lord of regality might repledge; for if he was the first

* Act 39. parl. 1693, act 37. parl. 1695, and act 8. parl. 1702.

firſt attacher, even after the fifteen days, it cannot be doubted, but that he had the excluſive privilege of proceeding in the trial, and of paſſing a definitive ſentence.

Thus we ſee the power of repledging reduced to a ſhadow, though in other reſpects the regality-court ſtill maintained its rank, as coordinate with the court of juſticiary; acknowledging no ſuperior but the parliament. But as the regality-court had by this time loſt all its original authority, its privileges were little regarded. The judges of the court of juſticiary gradually increaſing in power and dignity, heightened by contraſting them with regality-bailies, gave regality courts a ſevere blow, anno 1730, by admitting an advocation from the regality court of Glaſgow (2); which was in effect declaring a regality court ſubordinate to the court of juſticiary in criminal matters, as it had all along been to the court of ſeſſion in civil matters. This, it is true, was a church regality, annexed to the crown upon the Reformation; and the ſingularity of the caſe alarmed not much thoſe who were poſſeſſed of laic-regalities. But the court of ſeſſion gave regalities

(2) The act 3. Geo. II. cap. 32. impowering the judges of the court of juſticiary, or any of them, to ſtay for thirty days the execution of any ſentence of a regality-court importing corporal puniſhment, encouraged probably the court of juſticiary to aſſume this power.

galities the dead-blow without neceſſity, after heritable juriſdictions were aboliſhed by a late ſtatute. For by virtue of the powers delegated to this court, to try the rights of thoſe who ſhould claim heritable juriſdictions and to eſtimate the ſame in money, they found * the juſticiary belonging to the Earl of Morton over the iſlands of Orkney and Zetland, "to be an inferior juriſdiction only, and not co-ordinate with the court of juſticiary." This judgment did not reſt upon any limitation in the Earl's right, which was granted by parliament in the moſt ample terms; but upon the following ground, That the court of juſticiary as conſtituted by act 1672, is the ſupreme court in criminal, as the court of ſeſſion is in civil matters, which conſequently muſt render all heritable juriſdictions ſubordinate; courts of juſticiary as well as courts of regality. But there is not in that ſtatute, a ſingle clauſe which ſo much as hints at a greater power in the court of juſticiary than it formerly enjoyed. Thus it frequently happens, that the reaſon expreſſed is not always that which produces the judgment, but perhaps ſome latent circumſtance operating upon the mind imperceptibly. Here the act 1672 was given as the cauſe of the judgment; though probably what at bottom moved the judges,

* January 21. 1748.

judges, was a very different conſideration. The new form of the court of juſticiary, by ſubſtituting five lords of ſeſſion as perpetual members inſtead of juſtice-deputes who were ambulatory, beſtowed a dignity upon this court, to which it was formerly a ſtranger. This circumſtance, joined with the growing power of the crown, which communicates itſelf to the miniſters of the crown, advanced this court to a degree of ſplendor, that quite obſcured bailies of regality. We have reaſon to believe, that this elevation of the court of juſticiary, touching the mind imperceptibly, was really what influenced the judges; for it is difficult to conceive an equality of juriſdiction in two courts, that are ſo unequal in all other reſpects. And thus, by natural cauſes that govern all human affairs, territorial juriſdiction in Scotland was reduced to a mere ſhadow, which made it no harſh meaſure, to aboliſh it altogether by ſtatute.

TRACT

TRACT VII.

COURTS.

IN moſt countries originally, the inhabitants were collected into clans or tribes, governed each by a chieftain, in whom were accumulated the ſeveral offices of general, magiſtrate, and judge. Theſe clans or tribes, for a long courſe of time, ſubſiſted perfectly diſtinct from each other, without any connection or intercourſe among individuals of different clans. The invention of agriculture, extending connections beyond the clan, had a tendency to blend different clans together. Individuals of different clans, came to be more and more blended by intermarriages, and conſequently by blood. Commerce aroſe, and united under its wings, not only diſtant individuals, but different nations. The clan-connection, giving way by degrees, no longer ſubſiſts in any civilized country, being loſt in the more extended connections that have no relation to clanſhip.

This change of connection among individuals, introduced a change in juriſdiction. After clans were

were diſſolved, and individuals were left free to their private connections, the juriſdiction of the chieftain could no longer ſubſiſt. Inſtead of it, judges were appointed, to exerciſe juriſdiction in different cauſes, and in different territories.

In a very narrow ſtate, one judge perhaps may be ſufficient to determine all controverſies that belong to a court of law. But where the ſtate is of any extent, many judges are required for an accurate and expeditious diſtribution of juſtice. If there muſt be a number, diſtribute among them the different branches of law, inſtead of giving to each a juriſdiction in controverſies of whatever kind. It is here as in a manufacture: an artificer confined to one branch becomes more expert than if employed ſucceſſively in many. But in law this regulation hath its limits: courts may be diſtinguiſhed into civil, criminal, and eccleſiaſtical; but more minute diviſions would be inconvenient, becauſe the boundaries could not be accurately aſcertained.

For the reaſon now given, it becomes alſo proper, in an extenſive ſociety, to appoint a judge for every diſtrict. Such judges can have no interference, as their juriſdictions are diſtinguiſhed by natural marches and boundaries.

But judges ſubjected to no review, ſoon become arbitrary. Hence the neceſſity of ſuperior courts,

courts, to review the proceedings of the inferior. Where the ſuperior court is a court of appeal only, it has no regular continuance, and is never convened but when there is occaſion. This was formerly the caſe in Scotland, as we ſhall ſee by and by. It is an improvement to make this court perform, not only the duty of a court of appeal, but alſo that of an original court: in which caſe, it muſt have ſtated times of ſitting and acting, commonly called terms. And ſuch is the preſent condition of the ſuperior courts in this iſland.

Theſe obſervations lead to a diſtinction of courts into their different kinds. In the firſt place, courts are diſtinguiſhed by the nature of the cauſes appropriated to each: they are either civil, criminal, or eccleſiaſtical. This is the primary boundary, which ſeparates the juriſdiction of different courts.

The next boundary is territory. Courts of the ſame rank which judge the ſame cauſes, are ſeparated from each other by the marches of their reſpective diſtricts.

Courts ſuperior and inferior which judge the ſame cauſes, admit not any local diſtinction; becauſe a court ſuperior or ſupreme has a juriſdiction that extends over the territories of ſeveral inferior courts. In this caſe, there can be no ſeparation, other than the firſt citation.

Beſide theſe, there is in well-regulated ſtates, a court of a peculiar conſtitution, that has no original juriſdiction, but is eſtabliſhed as a court to review the proceedings of all other courts. This may properly be called a court of appeal; and ſuch is the conſtitution of the Houſe of Lords in Britain.

In the order here laid down, I proceed to examine the peculiar conſtitution of the courts in this country. And firſt, of the difference of juriſdiction with regard to cauſes. A man may be hurt in his goods, in his perſon, or in his character. The firſt is redreſſed in the court of ſeſſion, and in other inferior civil courts; the ſecond in the criminal court; and the third in the commiſſary court. Beſide theſe, the court of exchequer is eſtabliſhed, for managing ſubjects and making effectual claims, belonging to the crown. The court of admiralty has an excluſive juriſdiction, at the firſt inſtance, in all maritime and ſeafaring cauſes, foreign and domeſtic, whether civil or criminal, and over all perſons within this realm, as concerned in the ſame. There are alſo many particular juriſdictions eſtabliſhed with reſpect to certain cauſes, which muſt be tried by the judges appointed, and by none other.

The court of ſeſſion hath an original juriſdiction in matters of property, and in every thing that comes under the notion of pecuniary intereſt.

tereſt. Matters of rank and precedency, and of bearing arms, belong to the juriſdiction of the Lord Lyon. To determine a right of peerage, is the excluſive privilege of the Houſe of Lords. Nor has the court of ſeſſion an original juriſdiction, with reſpect to the qualifications of thoſe who elect or are elected members of parliament. The reaſon is, that none of the foregoing claims make a pecuniary intereſt. The court of ſeſſion, therefore, aſſumed a juriſdiction which they had not, when they ſuſtained themſelves judges in the diſpute of precedency betwixt the Earls of Crawford and Sutherland. It was a ſtill bolder ſtep, to ſuſtain themſelves judges in the peerage of Oliphant, mentioned in Durie's deciſions; and in the peerage of Lovat, decided a few years ago.

The matters now mentioned, are obviouſly not comprehended under the ordinary juriſdiction of the court of ſeſſion; and the court had no occaſion to aſſume extraordinary powers, when a different method is eſtabliſhed for determining ſuch controverſies. But what ſhall we ſay of wrongs, where no remedy is provided? Many inſtances of this kind may be figured, which, having no relation to pecuniary intereſt, come not regularly under the cogniſance of the court of ſeſſion. The freeholders of a ſhire, for example, in order to diſappoint one who claims to be inrolled, forbear to meet at the

Michaelmas head-court. This is a wrong, for which no remedy is provided by law; and yet our judges, confining themſelves within their ordinary juriſdiction, refuſed to interpoſe in behalf of a freeholder who had ſuffered this wrong, and diſmiſſed the complaint as incompetent before them *. Conſidering this caſe attentively, it may be juſtly doubted, whether ſuch confined notions with reſpect to the powers of a ſupreme court, be not too ſcrupulous. No defect in the conſtitution of a ſtate deſerves greater reproach, than the giving licence to wrong without affording redreſs. Upon this account, it is the province, one ſhould imagine, of the ſovereign, and ſupreme court, to redreſs wrongs of every kind, where a peculiar remedy is not provided. Under the cogniſance of the privy council in Scotland came many injuries, which, by the abolition of that court, are left without any peculiar remedy; and the court of ſeſſion have with reluctance been obliged to liſten to complaints of various kinds, that belonged properly to the privy council while it had a being. A new branch of juriſdiction has thus ſprung up in the court of ſeſſion, which daily increaſing by new matter, will probably in time produce a general maxim, That it is the province of this court, to redreſs all wrongs for which no other remedy

* 20th December 1753, Mackenzie of Highfield *contra* freeholders of the ſhire of Cromarty.

remedy is provided. We are, however, as yet far from being ripe for adopting this maxim. The utility of it is indeed perceived, but perceived too obſcurely to have any ſteady influence on the practice of the court; and for that reaſon their proceedings in ſuch matters are far from being uniform. In the foregoing caſe of the freeholders of Cromarty, we have one inſtance where the court would not venture beyond their ordinary limits; though thereby a palpable wrong was left without a remedy. I ſhall mention another inſtance, equally with the former beyond the ordinary juriſdiction of the court, where the judges ventured to give redreſs. A ſmall land-eſtate, conſiſting of many parcels, houſes, acres, &c. was ſplit among a number of purchaſers, who in a body petitioned the commiſſioners of ſupply, to divide the valuation among them, in order to have it aſcertained what part of the land-tax each ſhould pay. The commiſſioners, unwilling to ſplit the land-tax into ſo ſmall parts, refuſed the petition. Upon a complaint to the court of ſeſſion againſt the commiſſioners, the convener was appointed to call a general meeting, in order to divide the valuation among the complainers *. This was not even a matter of judgment, but of pure authority, aſſumed from the neceſſity of the thing,

* 4th Auguſt 1757, Malcolm and others *contra* commiſſioners of ſupply for the ſtewartry of Kirkcudbright.

there being no other remedy provided; for otherwiſe the court of ſeſſion hath not by its conſtitution any authority over the commiſſioners of ſupply. A wrong done by the commiſſioners, in laying a greater proportion of the land-tax upon a proprietor of land than belongs to him, may be rectified by the court of ſeſſion, as the ſupreme court in pecuniary matters; but this court has no regular authority over the commiſſioners, to direct their proceedings beforehand. In a queſtion betwixt the procurator fiſcal of the Lyon-court and Murray of Touchadam, 26th July 1775, it was admitted, that the court of ſeſſion cannot interpoſe in the giving arms to a family, being purely miniſterial. But if there be any diſpute about arms between two perſons, ſuch as the giving arms to one which are contended to belong to another, the court of ſeſſion muſt interpoſe, there being no other court for deciding ſuch diſputes.

Upon a new ſubject, not moulded into any form nor reſolved into any principle, men are apt to judge by ſentiment more than by general rules; and for that reaſon, the fluctuation or even contrariety of judgments upon ſuch ſubjects, is not wonderful. This is peculiarly the caſe of the ſubject under conſideration: for beſide its novelty, it is reſolvable into a matter of public police; which, admitting many views not leſs various than intricate, occaſions much

difficulty

difficulty in the law queſtions that depend on it. Such difficulties, however, are not inſuperable. Matters of law are ripened in the beſt manner, by warmth of debate at the bar, and coolneſs of judgment on the bench; and after many ſucceſsful experiments of a bold interpoſition for the public good, the court of ſeſſion will clearly perceive the utility of extending their juriſdiction to every ſort of wrong, where the perſons injured have no other means of obtaining redreſs.

This extraordinary power of redreſſing wrongs, far from a novelty, has a name appropriated to it in the language of our law. For what elſe is meant by the *nobile officium* of the court of ſeſſion, ſo much talked of, and ſo little underſtood? The only difficulty is, How far this extraordinary juriſdiction or *nobile officium*, is, or ought to be, extended. The juriſdiction of the court of ſeſſion, as a court of common law, is confined to matters of pecuniary intereſt; and it poſſibly may be thought, that its extraordinary juriſdiction ought to be confined within the ſame bounds. Such is the caſe of the court of exchequer; for its extraordinary or equitable powers, reach no farther than to rectify the common law, as far as relates to the ſubjects that come under its juriſdiction as a court of common law. But the power to redreſs wrongs of all kinds, muſt ſub-

ſiſt ſomewhere in every ſtate; and in Scotland ſubſiſts naturally in the court of ſeſſion. And with reſpect to the wrongs in particular that came under the juriſdiction of the privy council, our legiſlature, when they annihilated that court, muſt have intended, that its powers ſhould ſo far devolve upon the court of ſeſſion; for the legiſlature could not intend to leave without a remedy, the many wrongs that belonged to the juriſdiction of the privy council.

The rule I am contending for, appears to be adopted by the Engliſh court of chancery in its utmoſt extent. Every ſort of wrong occaſioned by the omiſſion or tranſgreſſion of any duty, is redreſſed in the court of chancery, where a remedy is not otherwiſe provided by common or ſtatute law. And hence it is, that the juriſdiction of this court, confined originally within narrow bounds, has been gradually enlarged over a boundleſs variety of affairs.

The juriſdiction of the court of ſeſſion in matters of property, is not only original, but totally excluſive of all other ſupreme courts. The property of the ſlighteſt moveable cannot be aſcertained by the juſticiary, by the exchequer, by the admiralty, or by the commiſſaries. The caſe is not preciſely the ſame in other matters of pecuniary intereſt. The commiſſaries of Edinburgh, as well as inferior commiſſaries, have, with the court of ſeſſion, a cumulative juriſdiction

tion in all ſuch matters referred to oath of party. And in all maritime and ſeafaring cauſes, the high court of admiralty has, by act 16. parl. 1681, an excluſive juriſdiction at the firſt inſtance. Formerly the juriſdiction of the court of ſeſſion in ſuch cauſes, was cumulative with that of the admiral. One peculiarity there was in this cumulative juriſdiction, that where a maritime cauſe was brought before the ſeſſion at the firſt inſtance, the judge of the admiral-court took his place among the Lords of Seſſion, and voted with them *. But by the ſtatute now mentioned, the powers and privileges of the admiral-court are greatly enlarged; and with relation to this court, the ſeſſion at preſent is a court of appeal; preciſely as the Houſe of Lords is with relation to the ſeſſion. Hence it ſeems to follow, that the court of ſeſſion cannot regularly ſuſpend the decree of an inferior admiral; which would be the ſame, as if a cauſe ſhould be appealed from the ſheriff to the Houſe of Lords. With regard to the admiral-court, it muſt be alſo obſerved, that by preſcription it hath acquired a juriſdiction in mercantile affairs; an incroachment which has no foundation, other than the natural connection that ſubſiſts between maritime affairs and thoſe that are mercantile. But the privileges of this court as

* Sinclair, 9th March 1543, Lord Bothwell *contra* Flemings.

as to the former, are not extended over the latter: The court pretends not to an excluſive juriſdiction in mercantile affairs; with reſpect to which it is an inferior juriſdiction, ſubjected, like the ſheriff-court, to the orders and review of the court of ſeſſion, by advocation, ſuſpenſion, and reduction, in the ordinary courſe. And we ſhall have occaſion to ſee afterward, that the privileges of the admiral court, with regard to mercantile cauſes, are not ſo entire as even thoſe of the ſheriff; it being the privilege of every perſon to decline the admiral-court in theſe cauſes.

Having deſcribed the cauſes proper to the court of ſeſſion, in contradiſtinction to the other ſupreme courts, I proceed to cauſes, proper to it, in contradiſtinction to inferior courts. Theſe may be comprehended under one rule, That all extraordinary actions, not founded on common law, but invented to redreſs any defect or wrong in the common law, are appropriated to the court of ſeſſion, being in civil cauſes the ſovereign and ſupreme court. Inferior courts are juſtly confined within the limits of common law; and if extraordinary powers be neceſſary for doing juſtice, theſe cannot ſafely be truſted but with a ſovereign and ſupreme court. Upon this account, the court of ſeſſion only, enjoys the privilege of voiding bonds, contracts, and other private deeds. For

the

the ſame reaſon, declarators of right, of nullity, and in general all declarators, are competent nowhere but in this court. An extraordinary removing againſt a tenant, who having a current tack is due a year's rent, is peculiar to this court, as alſo a proving the tenor or contents of a loſt writ. And laſtly, all actions between ſubject and ſubject founded ſolely upon equity, belong to the court of ſeſſion, and to none other.

With reſpect to criminal juriſdiction, our old law was abundantly circumſpect. Jealous of inferior courts, it confined their privileges within narrow bounds; and experience, the beſt teſt of political inſtitutions, hath juſtified our law in this particular. All public crimes, i. e. all crimes by which the public is injured, and where the King is the proſecutor, are confined to the court of juſticiary. With the political reaſon there is joined another, that it is not conſiſtent with the dignity of the crown, to proſecute in an inferior court. All private crimes, however enormous, may be proſecuted before the ſheriff. For if the private proſecutor who is injured chuſe this court, the law ought to give way. The only caſe where a baron is truſted with life and death, is where a thief is catched with the ſtolen goods; and, in this caſe, the law requires, that the thief be put to death within three ſuns. The law ſo far gives way

to

to the natural impulſe of puniſhing a criminal; an indulgence not much greater than is given to the party injured; for he himſelf may put the thief to death, if catched breaking his houſe. But after paſſion ſubſides, every one is ſenſible, that now there ought to be a regular trial *. The ſheriff has the ſame power with reſpect to ſlaughter, that the baron has with reſpect to theft. A man taken in the act of murder, or with *red hand*, as expreſſed in our law, muſt have juſtice done upon him by the ſheriff within three ſuns. If this time be allowed to elapſe, the criminal cannot be put to death without a citation and a regular proceſs, which muſt be before the juſticiary, unleſs the relations of the deceaſed undertake the proſecution.

By the act 1681, mentioned above, an excluſive juriſdiction is given to the high admiral, "in all maritime and ſeafaring cauſes, foreign "and domeſtic, whether civil or criminal; and "over all perſons within this realm, who are "concerned in the ſame." With reſpect to the civil branch of this juriſdiction, I have had occaſion to mention, that by preſcription it is extended to mercantile cauſes. But though the civil juriſdiction of this country, is ſo far encroached on by the court of admiralty, the criminal judges, I preſume, will be more watchful over

* A baron is deprived of all juriſdiction in capital caſes, by act 20° Geo. II. 43.

over the powers truſted with them. Prohibited goods were ſeized at ſea, and after they were put in a boat to be carried to land, the ſeizure-makers were attacked by thoſe who had an intereſt in the goods; and in the ſcuffle a man was put to death. A criminal proſecution being brought before the court of juſticiary, the judges doubted whether it did not belong to the admiral to try this crime, as committed at ſea. After mature deliberation, the court ſuſtained its own juriſdiction, upon the following grounds. It is not every civil cauſe ariſing at ſea, that is appropriated to the admiral, but only maritime and ſeafaring cauſes. Nor is every crime committed at ſea appropriated to him. The admiral has not a juriſdiction by the ſtatute, unleſs ſuch crime relate to maritime or ſeafaring matters. Every crime committed againſt navigation, ſuch as a mutiny among the crew, orders diſobeyed, a ſhip prevented by violence from ſailing, beating wounding or killing perſons in ſuch fray, piracy, and in general all crimes where the *animus* of the delinquent is to offend againſt the laws of navigation, are maritime or ſeafaring crimes, and come under the excluſive juriſdiction of the admiral. But if murder, adultery, forgery, or high treaſon, be committed on board a ſhip, the cognition belongs to the judge ordinary: The commiſſaries of Edinburgh will divorce, and the court of juſticiary,

ſticiary, or commiſſioners of *Oyer* and *Terminer*, will puniſh. The only argument for the admiral that ſeems plauſible is, That he is declared the King's juſtice general upon the ſeas, and in all ports, harbours, creeks, &c. But to what effect? The anſwer to this queſtion will clear the difficulty. He is not made juſtice-general with reſpect to all crimes whatever, but ſingly with reſpect to crimes concerning maritime or ſeafaring matters.

That a criminal juriſdiction belongs to the court of ſeſſion is certain. The preciſe nature of it is not altogether certain. Inſtead of pretending to decide in a matter that appears ſomewhat dubious, I venture no farther than to give two different views of this juriſdiction, leaving every man to judge for himſelf. The firſt is as follows. In certain criminal matters, the court of ſeſſion, by the force of connection, have been in uſe to exerciſe a criminal juriſdiction. Upon witneſſes who prevaricate before them, they are in uſe to animadvert by a corporal puniſhment *; which is inherent in every court, civil or criminal. Again, in the caſe of forgery tried by the court of ſeſſion, the court itſelf commonly inflicts the puniſhment where it is within the pain of death, without remitting the delinquent to the juſticiary †. The puniſhment,

* Gosford, 6th July 1669, Heirs of Towie, *contra* Barclay.

† Durie, 14th July 1638, Dunbar *contra* Dunbar.

ment, being a direct conſequence of the civil ſentence finding the defendant guilty of the forgery, belongs naturally to the court of ſeſſion; unleſs where the crime deſerves death, the inflicting of which puniſhment, would be an encroachment too bold upon the criminal court. A ſlight puniſhment may be conſidered as acceſſory to the civil judgment; but a capital puniſhment makes too great a figure in the imagination to be conſidered in that light.

I proceed to the ſecond view of this juriſdiction. It is not accurate to ſay, That the two courts of ſeſſion and juſticiary, are diſtinguiſhed by the cauſes appropriated to each; and that the former is a civil court, the latter a criminal court. The juſticiary is confined to crimes; but the court of ſeſſion is not confined to civil actions. It may juſtly be held, that this court hath a juriſdiction in all crimes, unleſs where the proof depends totally or chiefly on witneſſes. Not to mention puniſhments that are acceſſory to judgments in civil caſes, ſuch as puniſhment of forgery; many crimes public and private are proſecuted in this court, baratry, for example, and uſury, even where it is proſecuted by the King's Advocate *ad vindictam publicam* *. Theſe, and ſuch like cauſes, are undertaken by the court, where the evidence

* Haddington, 2d March 1611, Officers of State *contra* Coutie and others.

dence is chiefly by writ, and not by witneſſes. The proceſſes of fraudulent bankruptcy, and of wrongous impriſonment, are by ſtatute * confined to this court; and for the reaſon now given, ſtellionate will alſo be competent before it. It is clear indeed, that this court cannot judge in any criminal action that muſt be tried by a jury; becauſe its forms admit not this method of trial. Purpreſture muſt be tried by a jury; and for that reaſon only, cannot be brought before it. And for the ſame reaſon, a capital puniſhment is denied to this court; for a capital puniſhment cannot be inflicted without a jury.

Eccleſiaſtical courts, beſide their cenſorial powers with relation to manners and religion, have an important juriſdiction in providing pariſhes with proper miniſters or paſtors; and they exerciſe this juriſdiction, by naming for the miniſter of a vacant church, that perſon duly qualified who is preſented by the patron. Their ſentence is ultimate, even where their proceedings are illegal. The perſon authoriſed by their ſentence, even in oppoſition to the preſentee, is *de facto* miniſter of the pariſh, and as ſuch is entitled to perform every miniſterial function. One would imagine, that this ſhould entitle him to the benefice or ſtipend; for a perſon inveſted in any office, is entitled of courſe to the emoluments. And yet the court of ſeſſion, without

* Act 5. parl. 1696; Act 6. parl. 1701.

without pretending to deprive a miniſter of his office, will bar him from the ſtipend, if the eccleſiaſtical court have proceeded illegally in the ſettlement. Such interpoſition of the court of ſeſſion, ſingular in appearance, is however founded on law, and is alſo neceſſary in good policy. With reſpect to the former, there is no neceſſary connection betwixt being miniſter of a pariſh, and being entitled to a ſtipend; witneſs the paſtors of the primitive church, who were maintained by voluntary contributions. It belongs indeed to the eccleſiaſtical court to provide a pariſh with a miniſter; but it belongs to the civil court to judge whether that miniſter be entitled to a ſtipend; and the court of ſeſſion will find, that a miniſter wrongouſly ſettled has no claim to a ſtipend. With reſpect to the latter, it would be a great defect in the conſtitution of a government, that eccleſiaſtical courts ſhould have an arbitrary power in providing pariſhes with miniſters. To prevent ſuch arbitrary power, the check, provided by law, is, That a miniſter ſettled illegally ſhall not be entitled to a ſtipend. This happily reconciles two things commonly oppoſite. The check is extremely mild, and yet is fully effectual to prevent the abuſe.

The commiſſary-court is a branch of the eccleſiaſtical court, inſtituted for the diſcuſſion of certain civil matters, which among our ſuperſti-

tious anceſtors ſeemed to have an immediate connection with religion; divorce, for example, baſtardy, ſcandal, cauſes referred to oath of party, and ſuch like.

What ſhall be thought in point of juriſdiction, with reſpect to an injury where a man is affronted or diſhonoured, without being hurt in his character or good fame; as, for example, where he is reviled, or contemptuouſly treated. For redreſſing ſuch injuries, I find no court eſtabliſhed in Britain: We have not ſuch a thing as a court of honour. Hence it is, that in England words merely of paſſion are not actionable; as, You are a villain, rogue, varlet, knave. But if one call an attorney a knave, the words are actionable, if ſpoken with relation to his profeſſion whereby he gets his living *. I am not certain, that in England any verbal injury is actionable, except ſuch as may be attended with pecuniary loſs or damage. If not, we in Scotland are more delicate. Scandal, or any imputation upon a man's good name, may be ſued before the commiſſaries, even where the ſcandal cannot be the occaſion of any pecuniary loſs; it is ſufficient to ſay, I am hurt in my character. If I can qualify any pecuniary damage, or probability of damage, ſuch ſcandal is alſo actionable before the court of ſeſſion.

When

* See Wood's Inſtit. book 4. ch. 4. p. 536.

When the ſeveral branches of juriſdiction, civil, criminal, and eccleſiaſtical, were diſtributed among different courts, great care ſeems to have been taken, that courts ſhould be confined each preciſely within its own limits. Baſtardy, for example, could not be tried any where but in the eccleſiaſtical court; and ſo ſtrictly was this obſerved, that if a queſtion of baſtardy occurred incidentally in a proceſs depending before another court, the cauſe was ſtayed till the queſtion of baſtardy was tried in the proper court. This was done by a brieve from chancery, directed to the biſhop, to try the baſtardy as a prejudicial queſtion *. The expence and delay of juſtice, occaſioned by ſuch ſcrupulous confinement of courts within preciſe limits, produced in Scotland an enlargement of juriſdiction, by impowering every court to decide in all points neceſſary to a final concluſion of the cauſe. This regulation is but late, though we had been long tending toward it. In the ſervice of an heir, it was, and perhaps is, the practice, that if baſtardy be objected, the judge to whom the brieve is directed is bound to ſtay his proceedings, till the queſtion of baſtardy be determined by the commiſſaries. But in the reduction of ſuch a ſervice, if baſtardy be objected, the court of ſeſſion remit not the queſtion of baſtardy to be tried by the commiſſa-

* Reg. Maj. l. 2. cap. 50.

ries: they themſelves take cogniſance of it, ſingly to the effect of finiſhing the reduction. And this has been practiſed above a century *. The following caſe is of the ſame kind. A proceſs of aliment was brought before the court of ſeſſion, at a woman's inſtance againſt her alledged huſband. He denied the marriage, and ſhe offered a proof. It was thought by the court, that marriage here was not properly an incidental queſtion; that it was the fundamental propoſition, and the aliment merely a conſequence. For this reaſon, they ſtayed the proceſs of aliment, till the purſuer ſhould inſtruct her marriage before the commiſſaries: Fountainhall, 29th December 1710; Forbes; 25th January 1711, Cameron *contra* Innes. But that this was too ſcrupulous, I have authority to ſay from a ſimilar caſe determined lately. A child was produced in the ſeventh month after marriage; and the woman confeſſed, that her huſband was not the father, but a man ſhe named. In a proceſs of aliment againſt this man, he denied that he was the father, and inſiſted upon the preſumption *quod pater eſt quem nuptiæ demonſtrant.* Here legitimacy was the fundamental point, of which that of aliment was a conſequence. Yet the court, who were bound to give judgment on the aliment, had no difficulty to diſcuſs the preliminary queſtion about

* See Durie, 23d July 1630, Pitſligo *contra* Davidſon.

bout the baſtardy. And it was the general voice, that though, upon the medium of the child's being a baſtard, they ſhould decern for the aliment, this would not bar the child afterward from bringing a proceſs before the commiſſaries, to aſcertain its legitimacy *. Nor is it inconſiſtent, that two courts ſhould give contrary judgments to different effects; for both judgments may ſtand and be effectual. Such contrariety of judgments one would wiſh to avoid; but it is better to ſubmit to that riſk, than to make it neceſſary that different courts ſhould club their judgments to the finiſhing a ſingle cauſe; which has always been found a great impediment to juſtice. It is upon the ſame principle, that inferior judges, though they have no original juriſdiction in forgery, can try that crime incidentally when ſtated as a defence.

And this leads me to conſider more particularly a conflict betwixt different juriſdictions, where the ſame point is tried by both. This happens frequently, as above mentioned, with reſpect to different effects. But I ſee not that there can be in Britain a direct conflict betwixt two courts, both trying the ſame cauſe to the ſame effect. Oppoſite judgments would indeed be inextricable, as being flatly inconſiſtent; one of the courts, for example, ordering a thing to

* January 1756, Smith *contra* Fowler.

be done, and the other court diſcharging it to be done. This has happened betwixt the two houſes of parliament: it may again happen; and I know of no remedy in the conſtitution of our government. But in this iſland, matters of juriſdiction are better ordered than to afford place for ſuch an abſurdity. An indirect conflict may indeed happen, where two courts handling occaſionally the ſame point, in different cauſes, are of different opinions upon that point. Such contrariety of opinion ought as far as poſſible to be avoided for the ſake of expediency; as tending to leſſen the authority of one of the courts, and perhaps both. But as ſuch contrary opinions are the foundation of judgments calculated for different ends and purpoſes, theſe judgments when put to execution can never interfere. For example, being in purſuit of a horſe ſtolen from me; and in the hands of a ſuſpected perſon finding a horſe that I judge to be mine, I uſe the privilege of a proprietor, and take away the horſe by violence. A criminal proceſs is brought againſt me for robbery; againſt which my defence is, that the horſe is mine, and that it is lawful for a man to ſeize his own goods wherever he finds them. This obliges the criminal judge to try the queſtion of property, as a preliminary point. It is judged, that the evidence I have given of my property, is not ſufficient: the reſult is a ſentence

tence to reſtore the horſe, and to pay a fine. I obey the ſentence in both particulars. But as the queſtion of property was diſcuſſed with a view ſolely to the criminal proſecution, nothing bars me from bringing afterward a claim of property before a civil court; and if I prevail, the horſe muſt again be put in my poſſeſſion. This is not a conflict of execution, but only of opinion, which diſturbs not the peace of ſociety. The horſe is declared mine; this ſecures to me the property; but does not unhinge the criminal ſentence, nor relieve me from the puniſhment.

Another caſe of a ſimilar nature really exiſted. Before the juſtices of peace a complaint was brought by General St Clair, with concourſe of the procurator-fiſcal, againſt John Ranken officer of exciſe, charging, "That the "ſaid John Ranken did, without any legal or- "der, forcibly break open the doors or win- "dows of the houſe of Pitteadie, belonging to "the General; and, after rummaging, left the "houſe open, ſo as any perſon might have ac- "ceſs to ſteal or carry away the furniture; and "concluding that he ſhould be fined and pu- "niſhed for the ſaid riot and treſpaſs." The defendant acknowledged, "That upon a par- "ticular information of prohibited goods, he, "by virtue of a writ of aſſiſtance from the "court of exchequer, did force open a window

"of the houſe, and made a ſearch for prohibi-
"ted goods, but found none; that in acting
"*virtute officii*, he was liable to no court but
"the exchequer." The juſtices rejected the declinator, impoſed a fine upon the defendant, and ordered him to be impriſoned till payment. In this caſe there is no difficulty. The officers of the revenue are not exempted from the courts of common law; and on a complaint againſt any one of them for a riot or other malverſation, the juſtices muſt ſuſtain themſelves competent, and of courſe judge of the defence as well as of the libel. But I put a ſtraiter caſe, That the officer had found prohibited goods, and ſent them to the cuſtom-houſe. According to the foregoing ſentence of the juſtices, they muſt, in the caſe now ſuppoſed, have proceeded to order reſtitution of the goods, *quia ſpoliatus ante omnia reſtituendus*. But before reſtitution, a proceſs is brought in exchequer for forfeiting theſe goods as prohibited. In this proceſs the ſeizure is found regular, and the goods are adjudged to belong to the king. This judgment, which transfers the property to the king, relieves of courſe the officer from obeying the ſentence of the juſtices ordering him to reſtore the goods; for if the goods belong not to the plaintiff, he cannot demand reſtitution. But then if the officer have been fined by the juſtices, their ſentence ſo far muſt be effectual. The judg-

ment

ment of the court of exchequer, cannot relieve him from the fine.

By an act 12th George I. cap. 27. § 17. intitled, "An act for the improvement of his "Majeſty's revenues of cuſtoms and exciſe, "and inland duties," it is enacted, "That for "the better preventing of frauds in the enter-"ing for exportation any goods whereon there "is a drawback, bounty, or premium, it ſhall "be lawful for any officer of the cuſtoms, to "open any bale or package; and if upon exa-"mination the ſame be found right entered, "the officer ſhall, at his own charge, cauſe the "ſame to be repacked; which charge ſhall be "allowed to the officer, by the commiſſioners "of the cuſtoms, if they think it reaſonable." Upon this ſtatute, a proceſs was brought before the court of ſeſſion, againſt the officers of the cuſtoms at Port-Glaſgow, for unpacking many hogſheads of tobacco entered for exportation, without repacking the ſame. The defendants betook themſelves to a declinator of the court, contending, That this being a revenue-affair, it ſhould not be tried but in the court of exchequer. The court of ſeſſion had no opportunity to judge of this declinator, becauſe the matter was taken away by a tranſaction. But the following reaſons make it clear, that this declinator has no foundation. 1*mo*, Where an action of debt, from whatever cauſe ariſing, is brought before

before the court of ſeſſion, there can be no doubt of the competency of the court; becauſe its juriſdiction, with regard to ſuch matters, extends over all perſons of whatever denomination. The court therefore muſt be competent. And if ſo, every thing pleaded in way of defence muſt alſo come under the cogniſance of the ſame court, according to the modern rule, viz. That it is competent to judge of points proponed as a defence, to which the court is not competent in an original proceſs. 2*do*, With reſpect to the claim under conſideration, it is not competent before the court of exchequer, but only before the court of ſeſſion; by the act 6*to Ann*, conſtituting the exchequer, the Barons are the ſole judges in all demands by the king upon his ſubjects, concerning the revenues of cuſtoms, exciſe, &c.; but they have no juriſdiction where the claim is at the inſtance of the ſubject againſt the king. And for that reaſon, the claims againſt the forfeited eſtates, are by ſtatute appointed to be determined by the court of ſeſſion.

Having ſaid what was thought proper upon courts as diſtinguiſhed by the different cauſes appropriated to each, and as thereby different in kind; I proceed to conſider courts of the ſame kind, as diſtinguiſhed by territorial limits. As the juriſdiction of a territorial judge extends over all perſons and over all things within his territory,

territory, I ſhall firſt take under view perſonal actions, and next thoſe that are real. With relation to the former, it is a rule that *Actor ſequitur forum rei.* The reaſon is, that the plaintiff muſt apply to that judge who hath authority over his party, and can oblige him to do his duty; which muſt be the judge of that territory, within which the party dwells and has his ordinary reſidence. The inhabitants only are ſubjected to a territorial judge, and not every perſon who may be found occaſionally within the territory; ſuch a perſon is ſubjected to the judge of the territory where his reſidence is; and it concerns the public police, that juriſdictions be kept as diſtinct as poſſible. But as it may frequently be doubtful where the reſidence or domicil of a party is, a plain rule is eſtabliſhed in practice, That a man's domicil is conſtrued to be his lateſt reſidence for forty days before the citation. This however is not ſo ſtrictly underſtood, as that a man can have but one domicil. There is no inconſiſtency in his having at the ſame time different domicils, and in being ſubjected to different juriſdictions, ſuppoſing theſe domicils to be ſituated in different territories *. It was accordingly judged, that a gentleman, who had his country-houſe in the ſhire of Haddington and at the ſame time lived frequently with his mother-in-law

* See l. 6. § 2. l. 27. § 2. Ad municipalem.

law in Edinburgh and had a ſeat in one of the churches there, was ſubjected to both juriſdictions *. On the other hand, a man who has no certain domicil, muſt be ſubjected to that judge within whoſe territory he is found. This is commonly the caſe of ſoldiers; and hence the maxim, "Miles ibi domicilium habere videtur, "ubi meret, ſi nihil in patria poſſideat †." In a reduction accordingly of a decree againſt a ſoldier, pronounced by the bailies of a town where the regiment was for the time, and he perſonally cited; it being urged that he was not forty days there, and therefore not ſubjected to the juriſdiction; the Lords conſidering that ſoldiers have no fixed dwelling, repelled the reaſons of reduction ‡.

To this rule, that *Actor ſequitur forum rei*, there are ſeveral exceptions, depending on circumſtances that entitle the claimant to cite his party to appear before the judge of a territory where the party hath not a reſidence. A covenant, a delict, nativity, have each of them this effect. A covenant beſtows a juriſdiction on the judge of the territory where it is made, provided the party be found within the territory, and

* Fountainhall, 15th July 1701, Spottiſwood *contra* Moriſon.

† l 23. § 1. Ad municipalem.

‡ Fountainhall, 12th November 1709, Lees *contra* Parlan.

and be cited there *. The reaſon is, that if no other place for performance be ſpecified, it is implied in the covenant, that it ſhall be performed in the place where it is made; and it is natural to apply for redreſs to the judge of that territory where the failure happens, provided the party who fails be found there. For the ſame reaſon, if a certain place be named for performance, this place only is regarded, and not the place of the covenant; according to the maxim, "Contraxiſſe unuſquiſque in eo loco "intelligitur, in quo ut ſolveret ſe obligavit †." The court of ſeſſion, accordingly, though they refuſed to ſuſtain themſelves judges betwixt two foreigners, with relation to a covenant made abroad, thought themſelves competent, where it was agreed the debt ſhould be paid in this country ‡.

A criminal judge, in the ſame manner, hath a juriſdiction over all perſons committing delicts within his territory, provided the delinquent be found within the territory, and be cited there, or be ſent there by the authority of a magiſtrate to whom he is ſubjected *ratione domicilii* ||. Nor can the delinquent decline the court, upon a pretext which in ordinary caſes would

* See l. 19. De judiciis.

† l. 21. De obligat. et action.

‡ Haddington, 23d November 1610, Vernor *contra* Elvies.

|| l. 3. pr. De re militari.

would be sufficient, viz. that he hath not a domicil within the territory, nor hath resided there forty days *. This matter is carried so far, as to prefer the *forum delicti* before that of the domicil; according to a maxim, That crimes ought to be tried and punished where they are committed; and that a judge hath no concern with any crime but what is committed within his own territory. Hence it is, that a baron having unlawed his tenant for blood, the decree was declared null; because the fact was not done upon the baron's ground; nor did the party hurt live within his territory; nor did he make his complaint there †. In like manner, the Lords turned into a libel, the decree of an inferior court fining a party for a riot committed in a different territory ‡. In these cases the prosecution was at the instance of the procurator-fiscal. But where the party injured is the prosecutor, I see no reason why he may not have his choice of either *forum*, viz. of the delict, or of the delinquent ‖.

With

* Gosford, 18th November 1673, Gordon *contra* Macculloch.

† Durie, 28th July 1630, Freeland *contra* Sheriff of Perth.

‡ Fountainhall, 14th February 1708, Procurator-fiscal of Dumblane *contra* Wright.

‖ See to this purpose, l. 1. C. Ubi de crimin. agi oporteat.

With relation to jurisdiction, civil, criminal, and ecclesiastical, I have had occasion to observe, how strictly each court was confined originally within its own province. The same way of thinking obtained with relation to territorial jurisdiction. To found an action, it was not sufficient that the defendant lived within the territory: if the cause of action did not also arise within the territory, the judge was not competent. In remedying disorders and inconveniencies, men seldom confine themselves within proper bounds. The jurisdiction exercised by chieftains over their own people was found so inconvenient, especially when different clans came to be mingled together by blood and commerce, that in reforming the abuse judges were confined within the strictest limits, with respect to territory as well as causes. And indeed, the thought was natural, that it is the duty of every judge to watch over the inhabitants of his territory, and to regulate their conduct and behaviour while subjected to his authority; but that he hath no concern with what is done in another territory. This I say is a thought that figures in theory; and might answer tolerably well in practice, while men were in a good measure stationary, and their commercial dealings confined to the neighbourhood. But it became altogether impracticable, after men were put in motion by extensive commerce.

The

The impediment to the diſtribution of juſtice, occaſioned by this narrow and confined principle of the common law, was in England ſoon felt, and an early remedy provided. The court of the conſtable and marſhal was eſtabliſhed for trying all actions founded upon contracts, delicts, or other facts, that had their exiſtence in foreign parts; and as the common law of England did not reach ſuch caſes, theſe actions were tried *jure gentium*. This court was much frequented while the Engliſh continued to have a footing in France. After they were forced to abandon their conqueſts there, the court, from want of buſineſs, dwindled away to nothing. To ſupport a court with ſo little proſpect of buſineſs, was thought unneceſſary; and a contrivance was found out, to bring before the courts of Weſtminſter the few cauſes of this nature that occurred. A fiction is an admirable reſource for lawyers, in matters of difficulty. The cauſe of action is ſet forth in the declaration, as having happened in ſome particular place within England. It is not incumbent on the purſuer to prove this fact; nor is it lawful for the defendant to traverſe it *. But inferior courts enjoy not the privilege of this fiction; and therefore in England, to this day, an inferior court is not competent in any proceſs, where the cauſe of

* See Arth. Duck de authoritate juris Civilis, l. 2. cap. 8. pars 3. § 15. 16. 17. and 18.

of action doth not ariſe within the territory of that court *. It is not ſufficient that the party againſt whom the claim lies is ſubjected perſonally to the juriſdiction. And if he retire into foreign parts, there is no power by the common law to cite him to appear before any court in England. There is not in the practice of England any form of a citation, reſembling ours at the market-croſs of Edinburgh, pier and ſhore of Leith. The defect of the Engliſh law with reſpect to perſons out of the kingdom, is ſupplied by 5th Geo. II. cap. 25.

We probably had once the ſame ſtrict way of thinking with reſpect to territorial judges; but in later times we have relaxed greatly and uſefully from ſuch confined notions. As to an action of debt, for example, what can it ſignify in point of juriſdiction, where the cauſe of action aroſe? The debtor's *mora* in the territory where he reſides, is a juſt foundation for a decree againſt him by the judge of that territory. Crimes indeed admit of a different conſideration: a judge or magiſtrate muſt preſerve the peace within his own territory; but reckons himſelf not concerned with crimes committed any where elſe. Upon that account, a criminal proſecution at the inſtance of the public, comes regularly before that judge within whoſe

* Abridgment of the Law, vol. 1. p. 562. 563. and 564.

territory the crime was committed. But, as above ſuggeſted, where the proſecution is at the inſtance of the party injured, he may bring the proſecution before that judge to whom the delinquent is ſubjected *ratione domicilii*. For where a proſecution is chiefly intended to gratify the reſentment of the party injured, it naturally belongs to him to chuſe the *forum*.

I proceed to the third exception, that of nativity; and in what caſes it makes a *forum*, deſerves peculiar attention; becauſe writers ſeem not to have any accurate notions about it. Juriſdiction was of old, for the moſt part, perſonal, founded upon the clan-connection; every perſon belonging to a clan, being ſubjected to the juriſdiction of the chieftain, and to none elſe. While ſuch was the law, nativity or the *locus originis* was the only circumſtance that founded a juriſdiction. Commerce gave a new turn to this matter, by the connections it formed among different nations, and by the confluence it produced in places of trade from all different countries. The clan-juriſdiction becoming by theſe means inexplicable, gave place to territorial juriſdiction; after which the *locus originis* became a mighty ſlight affair. The law of nations indulges individuals to change their country, and to fix their reſidence where they can find better bread than at home. Such migrations are frequent in all trading countries; and

and it would be unreaſonable to ſubject a man to the laws of his native country, after he has deſerted it, and is perhaps naturalized in the country where he is ſettled for life. It is indeed not an abſurd rule, that, even in this caſe, the duty he owes to his native country, ought to reſtrain him from carrying arms againſt it; and I obſerve, that this has been reckoned the law of nations. But ſuppoſing him ſo far bound, it is a much wider ſtep to ſubject him to the courts of his native country, where he has no reſidence, where he has no effects, and to which he has no intention ever to return. I might add, were it neceſſary, that the effect of nativity even with regard to treaſon, is at preſent ſcarce thought rational, without other circumſtances to ſupport it; and that it is a puniſhment too ſevere, to put to death as guilty of high treaſon the ſubjects of a foreign prince taken in war, merely becauſe they were born in the country where they are priſoners. Voet * cites many authorities to prove, that birth ſingly doth not produce a *forum competens*, *excepto ſolo majeſtatis crimine*. And therefore, upon the whole, the following concluſion ſeems to be well founded, That nativity, with reſpect to the preſent ſubject, ſtands upon the preciſe ſame footing with contracts and delicts; and that like the *locus contractus*, and *locus delicti*, the *locus originis*

* De judiciis, § 91.

ginis will found a juriſdiction, provided the party be found within the territory. None of them have any other effect, than to ſubject the party to a juriſdiction where he hath not a reſidence (1).

I am aware, that in practice actions are commonly ſuſtained againſt natives of this country, even when they are abroad *animo remanendi*; and in this caſe that an edictal citation at the market-croſs of Edinburgh, pier and ſhore of Leith, is held ſufficient. It is not however poſitively aſſerted, that ſuch perſons, like inhabitants, are ſubjected to the courts of this country. The pretext commonly is, that the decree is intended for no other purpoſe but to attach the

(1) To carry this matter a ſtep farther, I put the caſe, That a man born in Scotland and having a land-eſtate there, goes abroad, is naturalized in a foreign country, acquires a fortune, and ſettles there with his family, *animo remanendi*. Will not he and his deſcendants, while they retain their family-eſtate in Scotland, be conſidered as Scotſmen? I incline to the affirmative, and that they will be ſubjected to the courts here, preciſely like natives. And if this doctrine hold where a Scotſman ſettles in Holland, France, or Germany, it muſt *a fortiore* hold where he ſettles in England, which with Scotland makes one kingdom. But an Engliſhman, by purchaſing a land eſtate here, becomes not *eo ipſo* a Scotſman, to be ſubjected perſonally to the courts of this country. In particular, he is not liable to anſwer a citation at the market-croſs of Edinburgh, pier and ſhore of Leith. Such weight is ſtill laid upon the *locus originis*.

the debtor's effects in Scotland, and his perſon when found in his native country. Several of theſe caſes, which cannot be juſtified by principles, are collected in the Dictionary *. So much appears from them, that the court of ſeſſion did not pretend to aſſume a juriſdiction over the ſubjects of a foreign prince, upon account ſingly of their being natives of Scotland; and that, in order to found ſuch juriſdiction, it was thought neceſſary to have reference to effects ſituated here, either really or by ſuppoſition. But there is no accuracy in this way of thinking. If nativity, ſingly conſidered, make a *forum*, the juriſdiction requires no ſupport from collateral circumſtances. If nativity ſingly make not a *forum*, no other circumſtance can be held ſufficient, unleſs actual preſence. Without this circumſtance, the judge cannot give authority even to the firſt act of juriſdiction, viz. a citation. And therefore, all that can in this caſe be done, is to proceed as againſt foreigners whoſe effects are found within Scotland.

The foregoing exceptions to the rule of law *quod actor ſequitur forum rei*, are conſtraints upon the defendant, by obliging him to anſwer in another juriſdiction than where he has fixed his reſidence. Prorogation of juriſdiction is an exception of a different nature, for it puts the party under no conſtraint. Where a man is

* Vol. 1. p. 327.

called before an incompetent court, he may offer a declinator; and it is only in caſe he forbear to make this objection, that the decree is held good againſt him, by his acquieſcence in the juriſdiction. How far and in what caſes ſuch prorogation can have effect, is not clearly laid down by our writers. Lawyers are apt to be miſled, by following implicitly what is ſaid in the Roman law upon this ſubject. For theſe reaſons, I ſhall handle the ſubject at large; and endeavour to fix, the beſt way I can, how far decrees are by our law effectual, upon the footing merely of prorogation. This ſubject is treated by Roman writers with great accuracy *. "Si ſe ſubjiciant alicui juriſdictioni et "conſentiant; inter conſentientes, cujuſvis ju-"dicis qui tribunali præeſt, vel aliam juriſdic-"tionem habet, eſt juriſdictio." Thus, though conſent, by the Roman law, cannot make a man a judge who is not otherwiſe a judge; it has however the effect to beſtow upon a judge a new juriſdiction, and to enable him to determine in a caſe, to which, abſtracting from conſent, he is incompetent. Upon this principle, a civil judge may determine in a criminal matter, a criminal judge in a matter that is civil; and a judge, whoſe juriſdiction is limited with reſpect to ſums, may give judgment without limitation.

* l. 1. De judiciis.

mitation *. And hence the doctrine laid down by commentators, may be eaſily underſtood. They mention four different ways by which a juriſdiction may be limited; it may be limited as to time, as to place, as to perſons, and as to cauſes. With reſpect to the two firſt, it is evident from the law above cited, that juriſdiction cannot be prorogated. A judge, after his commiſſion is at an end, has no manner of juriſdiction; and as little juriſdiction has he, beyond the bounds of his territory. But as to perſons and cauſes the matter is otherwiſe. For though conſent cannot advance a private man to be a judge; yet, ſuppoſing him once a judge, conſent will, in the Roman law, enable him to pronounce ſentence againſt a perſon not otherwiſe ſubjected to his juriſdiction, and in a cauſe where he has no original juriſdiction.

Our law, with relation to perſons, is the ſame. For though it be a rule in both laws, that the authority of a judge is confined within his territory, and that no perſon living in another territory is bound to obey his ſummons; yet, by our law as well as that of the Romans, if a man cited irregularly chuſe to appear, or if he appear without citation, and plead defences, the juriſdiction is thereby prorogated, and the decree hath its full effect. But with reſpect to cauſes, our law differs widely. A civil cauſe

* See as to this laſt point, l. 74. § 1. De judiciis.

brought before the juſticiary, will not produce an effectual decree, even with the expreſs conſent of the defendant. In like manner, if a proceſs for contravention of laburrows, which is peculiar to the court of ſeſſion, be brought before an inferior court, the acquieſcence of the defendant, ſubmitting to the juriſdiction and pleading defences, will not prorogate the juriſdiction. The decree is null by exception *. And the like judgment was given with reſpect to an extraordinary proceſs of removing, founded on the leſſee's failure to pay his rent †. With reſpect to cauſes where the judge is incompetent, it is a rule with us, That conſent alone cannot found a juriſdiction, nor impower the judge to give ſentence. Cauſes againſt members of the college of juſtice when ſued before an inferior court, are not an exception from this rule. It is their privilege, to have every civil action againſt them tried in the court of ſeſſion; and the defendant may advocate upon his privilege, if he chuſe not to ſubmit to the inferior judge. Acquieſcence, however, in the inferior judge is not a prorogation of juriſdiction, but merely the waving a privilege; for a court, which hath a radical juriſdiction, ſtands in no need

* Haddington, 6th July 1611, Kennedy *contra* Kennedy.

† Falconar, 22d December 1681, Beaton *contra* his tenants.

need of a prorogation to eſtabliſh its authority. An action of debt, for example, is competent before the ſheriff againſt every inhabitant within his territory, not excepting members of the college of juſtice. The only difference is, that theſe enjoy the peculiar privilege of removing the cauſe, if they think proper, to the court of ſeſſion. But if they chuſe not to uſe their privilege, the ſheriff goes on againſt them as againſt others, by virtue of his original juriſdiction. The ſame is preciſely the caſe of the judge-admiral, with relation to mercantile cauſes. Theſe are not contained in his charter; in theſe however he hath obtained a juriſdiction by preſcription; not ſo perfectly indeed, as to oblige any one to ſubmit to this aſſumed juriſdiction. If he ſubmit, the decree will be effectual; and even a decree in abſence will be effectual. But a defendant, who is not willing to ſubmit to ſuch juriſdiction, may bring the cauſe before the court of ſeſſion by advocation, ſingly upon privilege, without being obliged to aſſign any other reaſon.

Having diſcuſſed perſonal actions, which with relation to territorial juriſdiction are firſt in order, I proceed to real actions. A real action is, where the concluſion of the declaration or libel reſpects things only, and not perſons; as, for example, a declarator of property or ſervitude, a declarator of marches, and ſuch like. And the

the queſtion is, What is the proper court for trying ſuch cauſes, when the ſubject or thing is locally within one territory, and the poſſeſſor within another? This is not an intricate queſtion. The anſwer obviouſly is, That where the concluſion regards the ſubject, that judge muſt be choſen who hath authority over it, viz. the judge of that territory where it is ſituated; for territorial juriſdiction is connected with things as well as with perſons. But a difficulty occurs in this caſe. The poſſeſſor ought in juſtice to be called, in order to defend his intereſt; and yet he cannot be ſummoned by a judge within whoſe territory he reſides not. My notion in this matter may, I am afraid, appear ſingular. I acknowledge, that thoſe perſons only who have a domicil within the territory, are ſubjected to the authority of the court; and that it is in vain for a judge to command any thing to be done or forborn, by a perſon who is not under his authority. Such perſon cannot even be cited to appear in court; becauſe no perſon is bound to obey the commands of a judge who hath no authority over him. The matter, however, is not without remedy. Inſtead of a citation, which implies juriſdiction, why may not an intimation or notification ſuffice, in a caſe where there is no perſonal concluſion againſt the party *? Such notification may

* See a form of proceſs annexed to the Reg. Majeſt. ch. 4. § 4. & 5.

may be given by any one, eſpecially by the judge. Such notification withal, in material juſtice, is equivalent to a regular citation; becauſe it hath all the advantages of a citation, by affording the party full opportunity to defend his intereſt. If this form of proceſs be unexceptionable in point of rationality, it is in a good meaſure neceſſary in point of expediency. For how otherwiſe ſhall any real claim be made effectual, where the antagoniſt and the ſubject in debate are not both within the ſame territory? If I ſhall follow the domicil of my party, a decree againſt him may be a foundation for damages, but will not put me in poſſeſſion of the ſubject. This branch of my claim cannot by any other judge be made effectual, than by the judge of the territory where the ſubject is. From this hint it is evident, that if a notification be not ſufficient, the ſupreme court muſt be applied to in every caſe of this nature, which would be a great defect in public police. Nor would even this be always an effectual remedy; for what if my party be abroad *animo remanendi*, or perhaps a foreigner? In this caſe, there is no reſource but the notification; and in this caſe, luckily for my argument, the notification is held ſufficient. The proceſs I have in my eye, is that which commonly paſſes under the name of arreſtment *juriſdictionis fundandæ gratia*. The judge within whoſe territory the goods

goods of a foreign debtor are, having a juriſdiction over theſe goods though not over the proprietor, can adjudge them to a creditor for his payment. In this proceſs of adjudication or forthcoming, the perſon in whoſe hands the goods are found, is truſted with the notification; though, in my apprehenſion, the proceſs would be more regular and more ſolemn, were the notification directed by authority of the court. This proceſs, when it reſpects moveables, is generally preceded by an arreſtment of the goods, in order to prevent their being withdrawn and carried out of the territory; and as by this means the juriſdiction is ſecured, the arreſtment is termed an arreſtment *juriſdictionis fundandæ gratia*; improperly indeed: the arreſtment, far from founding the juriſdiction, ſuppoſes the juriſdiction antecedently founded; for by what authority could the arreſtment be uſed, if the goods were not already ſubjected to the juriſdiction? And ſo little eſſential is an arreſtment to this proceſs, that if the creditor rely on the perſon in whoſe hands the goods are, he may carry on the proceſs to its final iſſue, without uſing an arreſtment.

In following out any real action, where the diſpute is with one of our own country who reſides not within the juriſdiction, I ſee no good cauſe why the form now mentioned may not be uſed as well as in the caſe of foreigners. And

I

I must observe, that we approach extremely near to this form, by obtaining the interposition of the court of session, or rather of the King, for citing the party to appear within the jurisdiction where the subject lies. The warrant for citation, in this case, is termed a *letter of supplement*, which is never given in a personal action; for there the rule obtains, *Quod actor sequitur forum rei*. And it appears to me, that this form of a supplement has crept in, not from necessity, because I hold a private notification to be sufficient, but from the prepossession of custom; a regular citation, as the first step of process, being so general, as to be thought necessary in all cases. Custom is so naturally productive of a bias, and takes so firm hold of the mind, that it requires the utmost fortitude of reason to overcome it. Were I not afraid of refining too much, I should venture to say further, that though every inhabitant in Scotland is bound to appear in the court of session when regularly called; yet I deny it to be in the power of this court, to oblige them to appear in any court to which they are not subjected. If my creditor shall bring a process against me for payment before a sheriff within whose territory I have no residence, the court of session cannot give warrant for a letter of supplement to oblige me to defend myself there; and were my presence equally necessary in a real action,

a letter of ſupplement could not be iſſued in a real action more than in one that is perſonal. But my preſence is not neceſſary, where there is no perſonal concluſion againſt me. Common juſtice indeed requires a notification; and the intention of a letter of ſupplement is not to be a warrant for citation, but only for notification.

To view this matter in its different circumſtances, we ſhall invert the caſe, by ſuppoſing the debtor to be within the juriſdiction, not his effects. Upon a minute of ſale of land, the vender is ſued within the ſheriffdom where he reſides, to grant a diſpoſition. Damages may be awarded for not fulfilling the covenant; but the land cannot be adjudged to the purſuer, becauſe it is not under the ſheriff's juriſdiction. The ſheriff hath by preſcription obtained a privilege of pronouncing a decree of adjudication *contra hereditatem jacentem;* but if the real eſtate be not locally within his territory, he cannot pronounce ſuch a decree. Hence a remarkable difference appears, betwixt a judicial transference of property or any real decerniture, and a perſonal decerniture reſpecting a particular ſubject. The former is *ultra vires* where the ſubject is not locally within the territory: not ſo the latter; for it is enough that the defendant have his reſidence within the territory. A judge may interpoſe his authority, and command

mand the defendant to fulfil his bargain by conveying land or moveables to the purſuer: To found the judge's authority in this caſe, it is not neceſſary that the ſubject be within the territory. But what if the defendant be refractory? The judge may puniſh him with impriſonment, or condemn him in damages. There the judge muſt ſtop; for he has no authority over the ſubject. Upon this footing, a burgeſs of Edinburgh ſuing another brother burgeſs in the town-court, to remove from certain lands *extra territorium*, the Lords thought the proceſs regular *. And upon the ſame footing, a Scotſman being convened before the court of ſeſſion for forging a title to a land-eſtate in Ireland, the court tried the forgery, becauſe the defendant was ſubjected to their juriſdiction; and the forgery being proved, the forged deed was ordained to be cancelled †. A debtor, within threeſcore days of his notour bankruptcy, goes to England with a favourite creditor, and there aſſigns to him, for his ſecurity and payment, a number of Engliſh debts. In a reduction upon the act 1696, againſt the aſſignee, he pleads, that the court of ſeſſion hath no juriſdiction over Engliſh debtors, and that this court cannot reduce an aſſignment which conveys ſubjects not under its juriſdiction. Ac-

cording

* Colvil, 7th March 1759, Johnſton *contra* Johnſton.

† Falconer, 14th February 1683, Murray *contra* Murray.

cording to the principles above laid down, the following anſwer appears to be good, That it was wrong in the aſſignee to concur with the bankrupt in a ſtratagem to defraud the other creditors, who, in the caſe of bankruptcy, are entitled to a proportion of the debtor's effects; that the aſſignee is ſubjected to the court of ſeſſion and to their orders; and that it is the duty of the court, to ordain the aſſignee to make over to the creditors the debts in queſtion, in order to an equal diſtribution; or rather to ſubject him to the creditors for a ſum equivalent to theſe debts, deducting what of theſe debts he ſhall convey to the creditors within a limited time.

In the beginning of this diſcourſe, I have given a ſketch of the different powers of our ſupreme courts, with reſpect to cauſes. Upon the preſent head it is proper to be obſerved, that theſe courts are alſo, in ſome meaſure, diſtinguiſhed with reſpect to territory. The territorial juriſdictions of the juſticiary and exchequer are not confined to land, but reach over all friths, and alſo over the ſea adjoining to the land: Theſe juriſdictions reach over Scotland, and the portions of water now mentioned are conceived to make part of Scotland. The juriſdiction of the court of ſeſſion is no leſs extenſive, conſidered as territorial; and it enjoys beſide a juriſdiction over all the natives of Scotland

land wherever exiſting, provided they have not deſerted their native country, but are abroad occaſionally only *. The admiral-court again hath a juriſdiction with regard to all maritime and ſeafaring matters, civil and criminal, happening in whatever part of the world, provided the perſon againſt whom the complaint is laid be found in this country.

With reſpect to our courts conſidered as ſuperior and inferior, I begin with obſerving, that the ordinary method of ſeeking redreſs of injuſtice done by an inferior court, is by appealing to one that is ſuperior. That this particularly was the method in Scotland, is clear from our moſt ancient law-books. It is laid down, "That a party may appeal from one court to "another, as oft as judgment is given againſt "him, finding borghs lawful for every doom "gainſaid; from court to court; till it be de-"cided for or againſt him in parliament; from "which no appeal can be made, becauſe it is "the higheſt court, and ordained for redreſſing "wrongs done by all inferior courts †." An appeal lay from the ſentence of a baron or freeholder, to the ſheriff; and from the ſentence of magiſtrates within burgh, to the chamberlain; from the ſheriff and chamberlain, to the king's juſticiar; and from him, not to the parliament

* See Abridgement of ſtatute-law, note 7.

† Mod. Ten. Cur. cap. 16.

as originally, but to thirty or forty perſons named by his Majeſty, with parliamentary powers to diſcuſs the appeal *.

This method for obtaining redreſs of error in judgment, hath in Scotland gone into diſuſe, excepting an appeal to the Britiſh Houſe of Lords, from the ſovereign courts; and to the higher eccleſiaſtical courts, from thoſe that are inferior. What was the cauſe of this innovation? We have the authority of Stair †, that after the inſtitution of the college of juſtice, appeals gave place to advocations, ſuſpenſions, and reductions. But by what means, and after what manner? Appeals are not diſcharged by any ſtatute; and depending on the will of thoſe who conceive themſelves wronged, are too obſequious to paſſion and prejudice to be tamely ſurrendered. Being here left in the dark by our writers, we ſhall try if the want of facts can be ſupplied by rational conjecture.

In order to talk with perſpicuity, I find it neceſſary to premiſe a hiſtorical account of the ſupreme courts that in this country have ſucceſſively been eſtabliſhed for civil cauſes. Through moſt of the European nations, at a certain period of their hiſtory, the king and council compoſed the only ſupreme civil court, in which all cauſes were tried that came not under the juriſdiction of inferior courts. But it muſt be remarked,

* Act 95. parl. 1503. † L. 4. cap. § 31.

marked, that, in Scotland at leaſt, this was not a court of appeal; for, as above obſerved, cauſes originally were removed by appeal from the King's juſticiary to the parliament, and afterward to perſons appointed by the King with parliamentary powers. This court, having no continuance nor regular times of meeting, was extremely inconvenient; beſide that the King, who preſided, had little time or inclination for deciding in private affairs. This made it neceſſary to eſtabliſh regular courts for different cauſes; having appointed terms of ſufficient length for all matters that ſhould come before them. Thus in England, the king's bench, the exchequer, and the court of common pleas, aroſe out of the ſaid court, and were all fully eſtabliſhed in the reign of Edward I. We did not early apply ſo effectual a remedy. What firſt occurred to our legiſlature, was, to relieve the King and council, by ſubſtituting in their place the court of ſeſſion *, to ſit three times in the year, in order "finally to determine all "and ſundry complaints, cauſes, and quarrels "that may be determined before the King and "his council." This court acted but forty days at a time; and the members, who ſerved by rotation, were ſo numerous, that the round was ſeldom completed in leſs time than ſeven years †. This court was far from being a com-

* Act 65. parl. 1425. † See act 63. parl. 1457.

plete remedy. Its members and its place of ſitting were changeable; and its terms were too ſhort. The next attempt to remedy the inconveniencies of the former courts, was the daily council, erected by the act 58. parl. 1503. The ſtatute, on a narrative of the great delay of juſtice by the ſhort terms of the ſeſſion, and their want of time, appoints a council to be choſen by the King, to ſit continually in Edinburgh the year round, or where elſe it ſhall pleaſe the King to appoint, to determine all cauſes that were formerly competent before the ſeſſion. This court, called *The Daily Council*, from their ſitting daily through the year, was alſo defective in its conſtitution, having no quorum named, nor any compulſion on the judges to attend. By that defect it frequently happened, that a cauſe paſſed ſucceſſively through the hands of different judges; which was a great impediment to the regular adminiſtration of juſtice; for in a politic body of judges, there is not a greater diſeaſe than a fluctuation of the members. This court accordingly was ſoon laid aſide, to make way for the court of council and ſeſſion, eſtabliſhed *in anno* 1532, in the ſame form that at preſent ſubſiſts, having ſtated terms of a reaſonable endurance, and a certain number of judges, who all of them are tied to punctual attendance.

To

To return to appeals, I remark, that an appeal was competent againſt an interlocutory as well as againſt a definitive ſentence *; which might be extremely vexatious, by putting it in the power of the defendant to prolong a cauſe without end. Figure only a civil action furniſhing exceptions partly dilatory and partly peremptory, to the amount of half a dozen, which is no bold ſuppoſition; and obſerve what may follow. In an appeal, the aſcent was neceſſarily gradual to the court next in order; for there was not acceſs to the court in the laſt reſort, till redreſs was denied by each of the intermediate courts. Thus, from the ſentence of a baron-court, or of the bailie-court in a royal borough, there muſt have been no fewer than three appeals in order to obtain the judgment of the parliament, or of the court of appeal put in place of the parliament. Suppoſing each of the exceptions to occaſion three appeals, there might be eighteen appeals in this cauſe before a final determination; an admirable device for giving free ſcope to a ſpirit of litigioſity. The firſt attempt I find made for redreſs, is in the act 105. parl. 1487, beſtowing a privilege upon thoſe who are hurt by the partiality of inferior judges, "to ſummon before the King and "council, the judge and party, who ſhall be "bound to bring the rolls of court along with

 "them

* Act 41. parl. 1471.

"them in order to verify the matters of fact; "and if inquity be committed, the proceſs ſhall "be reduced and annulled." It is declared at the ſame time, that this method of obtaining redreſs, ſhall not exclude the ordinary proceſs of appeal, if it ſhall be more agreeable to the party aggrieved. This regulation is declared to endure till the next parliament only. But though we do not find it renewed in any following parliament, it would be raſh to infer that it was laid aſide. If it was reliſhed by the nation, which we have great reaſon to believe, it is more natural to infer, that it was kept in obſervance without a ſtatute. One thing appears from the records of the daily council ſtill preſerved, that very early after the inſtitution of that court, complaints were received againſt the proceedings and decrees of inferior judges; and, upon iniquity or error found, that the proceedings were rectified or annulled. The very nature and conſtitution of the court favoured this remedy; eſpecially as the remedy was not altogether new. This court could not receive an appeal, becauſe the privilege was not beſtowed upon it; and the whole forms of a proceſs of appeal, were accurately adjuſted by parliament immediately after the inſtitution of this court *. Now, no man who had once experienced an eaſier remedy, would ever patiently ſubmit

* Act 95. parl. 1503.

ſubmit to the hardſhip and expence of multiplying appeals through different courts, before he could get his cauſe determined in the laſt reſort. We may take it for granted, that a direct application to the daily council for redreſs, would be the choice of every man who conceived injuſtice to be done him by an inferior judge. He could not bring his cauſe before this court by appeal, which juſtified his bringing it by ſummons or complaint. And in this form he had not any difficulty to ſtruggle with, more than in an appeal; for the former requires no antecedent authority from the court, more than the latter. This aſſumed power of reviewing the decrees of inferior judges, was ſoon improved into a regular form. Decrees of regiſtration were from the beginning ſuſpended and reduced in this court; and by its very inſtitution, it was the proper court for ſuch matters. The ſame method came to be followed, in redreſſing iniquity committed by inferior judges. In place of a complaint, a regular proceſs of reduction was brought; and becauſe this proceſs did not ſtay execution, the defect was ſupplied by a ſuſpenſion.

This deduction affords an anſwer to a queſtion that has puzzled our antiquaries, viz. How it comes that we hear not of appeals after the inſtitution of the college of juſtice. Stair, in the paſſage quoted above, ſays ſlightly, That

after the inſtitution of this college, they fell in deſuetude, and gave place to advocations, ſuſpenſions and reductions. We find this to be a miſtake. And indeed had they not been antecedently in diſuſe, it would be difficult to account how it ſhould have happened, that in none of the records of this court, is there a ſingle word of appeals. On the contrary, in its firſt form of proceſs, we find reduction of inferior decrees among thoſe proceſſes that are to be called in a certain order *.

It may be obſerved by the way, that the proceſs of reduction, firſt practiſed in the daily council, and afterward in the preſent court of ſeſſion, put an end to the difference betwixt the ſheriff and baron courts in point of ſuperiority. When appeals went into diſuſe, the ſheriff loſt his power of reviewing the ſentences of the baron-court; and theſe courts came to be conſidered as of equal rank, becauſe the proceedings of both were equally ſubjected to the review of the court of ſeſſion.

To redreſs errors in judgment by appealing to a ſuperior court, is undoubtedly the more natural remedy; becauſe, in caſe of variance, it reſembles in private life an appeal to a common friend, or to a neutral perſon. But reductions and ſuſpenſions have more the air of a complete legal police. Theſe actions proceed upon authority

* Act 45. parl. 1537.

thority of letters from the King, who is conceived to be watchful over the welfare of his people, and attentive that juſtice be done them. When an act of injuſtice is done by an inferior court, he brings the cauſe before his own court, where juſtice will be impartially diſtributed.

Connection leads me to an advocation, or a *Certiorari* as termed in England; which is the form of redreſſing iniquity or error committed by an inferior judge, before the final ſentence is pronounced. An advocation originally was not granted but for a delay or refuſal of juſtice. So ſays Voet in expreſs terms *. And that this alſo was the uſe of an advocation here, appears from Reg. Maj. l. 3. cap. 20. 21. The King and council was at firſt the only court that had the privilege of advocating cauſes *ob denegatam juſtitiam*. This privilege was not communicated to the court of ſeſſion inſtituted in the 1425; which by act 62. parl. 1457, was confined to original actions founded on brieves; and complaints againſt judges for delay of juſtice, continued as formerly to be tried before the King and council, act 26. parl. 1469, act 62. parl. 1475. From the former of theſe it appears, that, upon a complaint of injuſtice or partiality, letters of advocation were iſſued to bring the judge before the King and council, to anſwer to the complaint, and to puniſh him if the complaint

* De judiciis, § 143.

plaint was verified. But as to the cauſe itſelf, the party wronged got no redreſs; being left to ſeek redreſs in the ordinary form of law by an appeal. The rules of law, originally ſimple, turn more and more intricate in the progreſs of ſociety; and the King, occupied with affairs of ſtate or with his pleaſures, has little ſkill and leſs inclination to hold courts. The privilege of advocation, which had been denied to the court of ſeſſion, was now permitted to the daily council; but ſtill to be exerciſed within its original limits. Balfour * mentions a caſe ſo late as the 1531, where it was decided, that after litiſconteſtation a cauſe could not be advocated; for litiſconteſtation removed any pretext of a complaint for delay of juſtice. But the preſent court of ſeſſion, applied early the remedy of an advocation, to correct unjuſt or erroneous proceedings in inferior courts, termed *iniquity* in the law-language of Scotland. An appeal by this time was in diſrepute; and it being eſtabliſhed that iniquity could be redreſſed by a reduction after a final ſentence, it was thought natural to prevent an unjuſt ſentence, by advocating the cauſe before hand. And the court was encouraged to proceed in that manner, it being a ſhorter and leſs expenſive method of obtaining redreſs, than by an appeal. Thus it came about, that an advocation, invented

* p. 342. cap. 12.

vented as a remedy for delay of juſtice, was extended to remove cauſes to the court of ſeſſion, where there was any ſuſpicion of partiality in the inferior judge, or where there occurred any perſonal objection; till it obtained that iniquity ſingly was a ſufficient ground. This improvement, however beneficial to the public, was not at firſt reliſhed by our legiſlature. It was ordained by act 39. parl. 1555, "That "cauſes be not advocated by the Lords from "the judge-ordinary, except for deadly feud, "or where the judge is a party, or the cauſes "of the Lords of Seſſion, their advocates, "ſcribes, and members." But this ſtatute, occaſioned by ſome remaining influence of former practice, had no great authority, and ſoon ſlipt into diſuſe. Advocations upon iniquity, gaining ground daily, baniſhed appeals againſt interlocutory ſentences; and, being more eaſy and expeditious, became the only remedy.

After appeals in civil actions yielded to advocations, reductions, and ſuſpenſions, the power of advocation was for many years reckoned an extraordinary privilege, competent to the court of ſeſſion only. Stair obſerves *, "That no "court in Scotland has this privilege but the "court of ſeſſion." It was ſo in his time; but the improvement did not ſtop there; it made its way into the court of juſticiary, and even

* L. 4. tit. 1. § 35.

even into the admiral-court; and from the following hiſtorical deduction, it will appear by what means that happened. The writ of *Certiorari* in England, is the ſame with our advocation. The court of chancery, being the ſupreme civil court, and the king's-bench, being the ſupreme criminal court, can both of them iſſue a *Certiorari*. No other court in England enjoys the privilege. Some method for redreſſing iniquity committed by an inferior judge, is no leſs neceſſary in criminal than in civil actions. The only difference is, that in a criminal action the remedy muſt be applied before the matter be brought before the jury; for we ſhall ſee by and by that a verdict is inviolable. An appeal to a ſuperior court, was originally the only method, in criminal as well as in civil actions. The inconveniencies of that method rendered it generally unpopular, and made it give place to advocation in civil cauſes, which was reckoned a great improvement. The Engliſh *Certiorari* ſhowed the advantages of the ſame remedy in criminal cauſes. But how to come at this remedy, was a matter of difficulty. The privilege of advocation, according to the eſtabliſhed notion, was confined to the court of ſeſſion. The juſticiary-court did not pretend to this privilege; and the court of ſeſſion could not properly interpoſe in matters which belonged to another ſupreme court. The known advantages

vantages of an advocation as an expeditious method for obtaining redreſs of wrong judgment, ſurmounted this difficulty. The court of ſeſſion received complaints of wrong done by inferior criminal judges; and, upon finding a complaint well founded, took upon them to remove the cauſe by advocation to the juſticiary. They alſo ventured to remove criminal cauſes from one court, to another that was more competent and unſuſpected *. The mean figure made in thoſe days by the court of juſticiary, conſiſting but of a ſingle judge, with aſſeſſors choſen from time to time to hold circuit-courts, encouraged the court of ſeſſion to claim this extraordinary privilege. And through the ſame influence, they interpoſed in eccleſiaſtical matters alſo. They advocated a cauſe for church-cenſure, from the dean of the chapel-royal, and remitted it to the biſhop and clergy †. And a miniſter who was purſued before a ſheriff as an intruder into a church, having preſented a bill of advocation to the court of ſeſſion, the cauſe was advocated to the privy council ‡.

The

* See Durie, 9th January 1629, Baron of Burghton *contra* Kincaid; Stair, 21ſt February 1666, —— *contra* Sheriff of Inverneſs.

† Stair, 19th December 1680, Macclellan *contra* Biſhop of Dumblane.

‡ Fountainhall, 5th June 1696, Alexander *contra* Sheriff of Inverneſs.

The court of juſticiary, after it was new modelled by the act 1672, made a much greater figure than formerly. It did not however begin early to feel its own weight and importance. Particularly it did not at firſt aſſume the privilege of advocation, though now that appeals were totally in diſuſe, that privilege belonged to it as the ſupreme court in criminal actions, as well as to the court of ſeſſion in thoſe that are civil. The court of ſeſſion continued to exerciſe the power of advocation in criminal matters as formerly; for which we have Mackenzie's evidence in his Criminals, title *Advocations*, and that of Dirleton in his Doubts, upon the ſame title. But the court of juſticiary afterward took this privilege to itſelf; and it hath a ſignet of its own, which gives authority to its advocations. This privilege, as is uſual, was aſſumed at firſt with ſome degree of heſitation. It was doubted, whether a ſingle judge could paſs an advocation, or even grant a ſiſt on a bill of advocation. Some thought the matter of ſo great importance, as to require a *quorum* of the judges. But the practice of the court of ſeſſion, made this doubt vaniſh. There are many inſtances, as early as the 1699 and 1700, of advocations being paſſed by ſingle judges, and now it is no longer a matter of doubt. It remains only to be added, that the judge-admiral, following the example of the

two

two ſupreme courts of ſeſſion and juſticiary, is in the practice of advocating cauſes to himſelf from inferior admiral-courts.

The privilege of advocation in the court of juſticiary, introduced that of ſuſpenſion; which is now cuſtomary with regard to any error in the proceedings of an inferior judge. This court, as far as I know, has never ſuſtained a reduction of a criminal ſentence pronounced by an inferior judge; and it appears to me doubtful, whether the court will ever be inclined to extend its juriſdiction ſo far. My reaſon of doubt is, that a regular proceſs of reduction is not proper for a court which hath no continuance, and which is held occaſionally only. And were it proper, the privilege would be of very little uſe. An error in an interlocutory ſentence of an inferior judge, may be corrected by an advocation. The execution of a ſentence of condemnation may be prevented by a ſuſpenſion. If the perſon accuſed be acquitted by the verdict of the jury, the matter cannot be brought under review by reduction. If he be diſmiſſed from the bar upon any informality in the proceſs, he is liable to a new proſecution. I can diſcover then no neceſſity for a reduction, except ſingly with regard to pecuniary matters, as where damages and expences are unjuſtly refuſed. If in ſuch caſes the court of ſeſſion could not interpoſe, it would be neceſſary for

the

the court of juſticiary to undertake the reduction. But as the court of ſeſſion is reckoned competent to pecuniary matters, from whatever cauſe they ariſe, civil or criminal, the juſticiary-court acts wiſely in leaving ſuch reduction to the court of ſeſſion. This draws after it another conſequence, by a natural connection. The court of ſeſſion, which, by way of reduction, judges of fines, expences, and damages, refuſed in an inferior criminal court, aſſumes naturally power to judge of the ſame articles by way of ſuſpenſion, when an exorbitant ſum is given. Theſe conſiderations lay open the foundation of a practice current in the court of ſeſſion. Of riots, batteries, and bloodwits, depending before the ſheriff or other inferior judge, advocation is left to the court of juſticiary; but as the puniſhment of ſuch delinquencies is commonly a pecuniary fine, the court of ſeſſion ſuſtains its juriſdiction in the ſecond inſtance by reduction or ſuſpenſion *. From what is now ſaid, it muſt follow, that the courts of ſeſſion and juſticiary, have in ſome particulars a cumulative juriſdiction. In a criminal proſecution before the ſheriff, the perſon accuſed is, for example, acquitted, and obtains immoderate expence againſt the proſecutor, without any good foundation. In this, and many caſes

* Fountainhall, 4th March 1707, Alves *contra* Maxwell.

caſes of the ſame kind which may be figured, the party aggrieved has his option to apply to either court for a ſuſpenſion.

Upon the power of reviewing the proceedings of inferior courts, whether by the old form of appeal or by the later forms of advocation and reduction, what I have ſaid relates ſingly to iniquity committed by the judge. Iniquity alledged committed by a jury in giving their verdict, was reſerved to be handled ſeparately. In judging of proof, every thing ſworn by a witneſs in judgment, was held by our forefathers to be true; a poſition which indicates great integrity and ſimplicity of manners, but little knowledge of mankind. So far was this carried, that, till within a century and a half, a defendant was not ſuffered to alledge any fact contrary to thoſe contained in the declaration or libel. The reaſoning of our judges was to the following purpoſe. "The purſuer hath "undertaken to prove the facts mentioned in "his libel. If he prove them, they muſt be "true; and therefore any contradictory fact "alledged by the defendant muſt be falſe." Hence the rule in our ancient practice, That what is determined by an aſſize muſt be held for truth, and cannot thereafter paſs to another aſſize, Quon. attach. cap. 82. This is declared to be the rule in verdicts, even upon civil actions, Reg. Maj. l. 1. cap. 13. § 3. To ſup-

port this practice, another reaſon concurred. Litiſconteſtation originally was a judicial contract binding the parties to ſubmit to the facts that ſhould be proved, and barring every objection to the proof. But as brieves not pleadable, ſuch as a brieve of inqueſt, of tutory, of idiocy, are carried on without a contradictor, and conſequently without litiſconteſtation, more liberty was taken. To rectify a wrong verdict in ſuch a caſe, a remedy was provided by act 47. parl. 1471, which was a complaint to the King and council of the falſehood or ignorance of the inqueſt; and if the verdict was found wrong, it was voided, and the parties concerned were reſtored to their original ſituation. The legiſlature did not venture upon any remedy, where the verdict proceeded upon a pleadable brieve. This was left upon the common law, which preſerves the verdict entire, even where it is proved to be iniquitous; being ſatisfied to keep jurymen to their duty by the terror of puniſhment. In a proceſs of error, they were ſummoned before a great inqueſt, and, if found guilty of perjury, they were puniſhed with eſcheat of moveables, infamy, and a year's impriſonment *. The ſummons of error is limited to three years, not only where the purpoſe is to have the aſſizers puniſhed, but alſo as to the concluſion of annulling the verdict or

its

* Reg. Maj. l. 1. cap. 14.

its retour upon a brieve not pleadable *. But the reduction of the verdict or retour, upon a brieve of inqueſt, was afterwards extended to twenty years †. No verdict pronounced in a criminal cauſe ever was reviewable. For though the jury ſhould be found guilty of perjury by a great aſſize, yet their verdict is declared to be *res judicata*, whether for or againſt the pannel ‡. The ſame rule obtained with regard to verdicts in civil caſes upon pleadable brieves; and continued to be the rule till jury-trials in civil caſes were laid aſide.

As the diſuſe of jury-trials in civil cauſes is another revolution in our law, not leſs memorable than that already handled concerning appeals, the connection of matter offers me a fair opportunity to trace its hiſtory, and to diſcover, if I can, by what influence or by what means this revolution happened. To throw all the light I can upon a dark part of the hiſtory of our law, I take help from a maxim adopted by our forefathers, which had a ſteady influence in practice. The maxim is, That though queſtions in law may be truſted to a ſingle judge, matters of proof are ſafer in the hands of a plurality. It was probably thought, that in determining queſtions of law there is little truſt repoſed in a judge, becauſe he is tied down to a preciſe rule; but that as there can be no pre-

* Act 57. parl. 1494.
† Act 13. parl. 1617.
‡ Act 63. parl. 1475.

ciſe rule in matters of proof, it ought to be referred to a number of judges, who are a check one upon another. Whatever be the foundation of this maxim, it undoubtedly prevailed in practice. In all courts, civil and criminal, governed by a ſingle judge, we find juries always employed. Before the judge matters of law were diſcuſſed, and every thing preparatory to the verdict; but to the jury was reſerved cogniſance of the facts. On the other hand, juries never were employed in any Britiſh court, where the judges were ſufficiently numerous to act as jurymen. A jury was never employed in parliament, nor in proceſſes before the King and council. And in England, when the court laſt named was ſplit into the king's bench, the exchequer, and the common-pleas, I am verily perſuaded, that the continuance of jury-trials in theſe new courts, was owing to the following circumſtance, that four judges only were appointed in each of them, and but a ſingle judge in the circuit courts. Hence I preſume, that juries were not employed in the court of ſeſſion, inſtituted *anno* 1425. And the nature of its inſtitution adds force to the preſumption. Its members were choſen out of the three eſtates; and it was eſtabliſhed to relieve the King and council of a load of buſineſs growing daily on them. There is little reaſon to doubt, that this new court, conſiſting of many members, would adopt the forms of the two courts

to

to which it was ſo nearly allied. One thing we are certain of, without neceſſity of recurring to a conjecture, that the daily council, which came in place of the ſeſſion and equally with it conſiſted of many judges, had not from the beginning any jury-trials, but took evidence by witneſſes, and in every cauſe gave judgment upon the proof, preciſely as we do at this day. Theſe facts conſidered, it ſeems a well-founded conjecture, that ſo large a number of judges as fifteen, which conſtitute our preſent court of ſeſſion, were appointed with a view to the practice of the preceding courts, and in order to prevent the neceſſity of trying cauſes by juries. The daily council was compoſed of biſhops, abbots, earls, lords, gentlemen, and burgeſſes; in order probably that every man might be tried by ſome at leaſt of his own rank; and in examining the records of this court, we find at firſt few ſederunts but where at leaſt twelve judges are preſent. The matter is ſtill better ordered in the preſent court of ſeſſion. Nine judges muſt be preſent to make a *quorum*; and it ſeldom happens in examining any proof, that the judges preſent are under twelve in number. This I am perſuaded is the foundation of a propoſition that paſſes current without any direct authority from the regulations concerning the juriſdiction of this court, viz. that it is the grand jury of the nation *in civilibus*. In fact,

it is the inviolable practice, to give judgment upon the teſtimony of witneſſes in a full court, where there muſt always be at leaſt a *quorum* preſent; which is no ſlight indication that the court in this caſe acts as a jury. For why otherwiſe ſhould it be leſs competent to a ſingle member of the court, to judge of a proof than to judge of a point of law? This account of the court of ſeſſion, as poſſeſſing the powers both of judge and jury, cannot fail to be reliſhed, when it is diſcovered, that this was far from being a novelty when the court was inſtituted. The thought was borrowed from the court of parliament, the members of which, in all trials, acted both as judges and jurymen. One clear inſtance we have on record, *anno* 1481, in the trial of Lord Lile for high treaſon. The members preſent, the King only excepted, formed themſelves into a jury, and brought in a regular verdict, declaring the pannel not guilty. A copy of the trial is annexed, Appendix, No 6.

I cannot here avoid declaring my opinion, that in civil cauſes it is a real improvement, to truſt with eſtabliſhed judges the power of deciding on facts as well as on law. A number of men trained up to law, and who are daily in the practice of weighing evidence, may undoubtedly be more relied on for doing juſtice, than the ſame number occaſionally collected from

from the maſs of the people, to undertake an unaccuſtomed taſk, that of pronouncing a verdict on an intricate proof.

Suppoſing the foregoing account why juries are not employed in the court of ſeſſion to be ſatisfactory, it will occur, that it proves nothing with reſpect to inferior courts where the judges are commonly ſingle. I admit the obſervation to be juſt; and therefore muſt aſſign a different cauſe for the diſuſe of jury-trials in inferior courts. Were the ancient records preſerved of theſe inferior courts, it would I preſume be found, that civil cauſes were tried in them by juries, even after the inſtitution of the college of juſtice; and we are not at freedom to doubt of the fact, after conſidering the act 42. parl. 1587, appointing moleſtations to be tried by a jury before the ſheriff. In the records indeed of the ſheriff's court of Edinburgh, there is no veſtige remaining of a jury-trial in a civil action. This however is not a puzzling circumſtance, becauſe the records of that court are not preſerved farther back than the year 1595. I had little expectation of more ancient records in other ſheriffdoms; but conjecturing that the old form of jury-trials might wear out more ſlowly in ſhires remote from the capital, I continued to ſearch; and in the record luckily ſtumbled on a book of the ſheriff's court of Orkney, beginning 3d July 1602, and

ending 29th Auguſt 1604 (2). All the proceſſes engroſſed in this book, civil as well as criminal, are tried by juries. That juries wore gradually out of uſe in inferior courts, will not be ſurpriſing when it is conſidered, that an appetite for power, as well as for imitating the manners of our ſuperiors, do not forſake us when we are made judges. It is probable alſo, that this innovation was favoured by the court of ſeſſion, willing to have under their power of review, iniquitous judgments with relation to matters of fact; from which review they were debarred when facts were aſcertained by the verdict of a jury.

From

(2) In a book of the baron-court of Crainſhaw, there is a proceſs in a court held the 4th of April 1611, in the following words: "Becauſe it is often and diverſe times "complained upon by the pariſhioners, that their corns "were evil eaten and deſtroyed by geeſe and ſwine of "the laird, therefore thought it meet that an inqueſt "ſhould be choſen to that effect, and that they ſhould "reaſon the matter, laying aſide all particulars, whe-"ther they ſhould be kept or put away." An inqueſt is accordingly choſen: and their verdict follows: "The "haill inqueſt chuſed Walter Edingtown chancellor, "who found, after reaſoning and voting of the inqueſt, "that they ſhould be both keeped ſtill." The proceſs is abundantly ludicrous. It verifies the fact however, that jury-proceſſes continued in inferior courts after they were laid aſide in the court of ſeſſion. In this baron-court jury-trials became gradually leſs frequent; and there is no appearance of any after the 1632.

From the power which courts have to review the decrees of inferior judges, I proceed to the power which courts have to review their own decrees. The court of juſticiary enjoys not this power; becauſe the verdict is ultimate, and cannot be overturned. This obſtacle lies not in the way of the court of ſeſſion; and as the forms of this court give opportunity for ſuch review, neceſſity brought it early into practice; for the ſhort ſederunts of parliament would have rendered appeals, when multiplied, an impracticable remedy. It was neceſſary therefore to find a remedy in the court itſelf; which was obtained by aſſuming a power to reduce its own decrees. And an appeal came to be neceſſary in thoſe caſes only where the ultimate judgment of the court is unjuſt. This is the very reaſon, according to Balfour, which moved the court of ſeſſion to reduce its own decrees *. The admiralty is the only other court in Scotland that hath a privilege to review its own decrees; and this privilege is beſtowed by the act 16. parl. 1681.

Having diſcuſſed what occurred upon our courts in the three firſt views, I proceed to conſider a court of appeal; upon which I obſerve in general, that in its powers it is more limited than where it enjoys alſo an original juriſdiction. The province of a court of appeal, ſtrictly

* p. 268.

ly ſpeaking, is not to try the cauſe, but to try the juſtice of the ſentence appealed from. All that can be done by ſuch a court, is to examine whether the interlocutor or ſentence be juſtly founded upon the pleadings. If any new point be ſuggeſted, the court of appeal, having no original juriſdiction, muſt remit this point to be tried in the court below. A court, which along with its power of receiving appeals hath alſo an original juriſdiction in the ſame cauſes, can not only rectify any wrong done by the inferior court, but has an option, either to remit the cauſe thus amended to the court below, or to retain it to itſelf and proceed to the final determination.

The Houſe of Lords is undoubtedly a court of appeal with reſpect to the three ſovereign courts in this country. There are appeals daily from the court of ſeſſion. Appeals from the court of juſticiary have hitherto been rare, and probably will never become frequent; the proceedings of this court, being brought under preciſe rules, afford little matter for an appeal; which at the ſame time would be but a partial remedy, as the verdict of the jury can never be called in queſtion. An appeal, however, from this court is competent, as well as from the ſeſſion; of which there is one noted inſtance. The King's advocate and the procurator for the Kirk proſecuted the magiſtrates of Elgin before

the

the juſticiary, for an atrocious riot; ſpecifying, That being entruſted by the miniſters of Elgin with the keys of the little kirk of Elgin, they inſtead of reſtoring them when required, had delivered them to Mr Blair Epiſcopal miniſter, by which the eſtabliſhed miniſters were turned out of poſſeſſion. In this caſe, the following circumſtance came to be material to the iſſue, Whether the ſaid little kirk was or was not a part of the pariſh church. The affirmative being found by the court of ſeſſion, to which the point of right was remitted as preliminary to the criminal trial, the magiſtrates entered an appeal from the court of ſeſſion; and upon that pretext, craved from the court of juſticiary a delay till the appeal ſhould be diſcuſſed. The proſecutors oppoſed this demand; they founded on an order of the Houſe of Lords, 19th April 1709, reſolving, "That an appeal neither ſtays "proceſs nor ſiſts execution, unleſs the appeal "be received by the Houſe, an order made for "the reſpondent to anſwer, and the order duly "ſerved on the reſpondent;" and urged, that this not being done in the preſent caſe, the court ought to proceed. The court accordingly proceeded in the trial, and pronounced ſentence, 2d March 1713, "ordaining the defen-"dants to deliver up the keys of the little kirk, "with L. 20 of fine, and L. 30 of expences." The defendants appealed alſo from this ſentence

of

of the court of juſticiary, and the ſentence was reverſed.

The diſtinctions above handled, comprehend moſt of the courts that are to be found any where, but not the whole. We have many inſtances in Britain, of a new juriſdiction created for a particular purpoſe, and for no other. This commonly happens, where a fact is made criminal by ſtatute, and to be tried by certain perſons named for that preciſe purpoſe; or where a new and ſevere puniſhment is directed againſt what was formerly reckoned a venial tranſgreſſion; as for inſtance, the ſtatute 1ſt George I. cap. 18. againſt the malicious deſtroying growing trees, which impowers the juſtices of peace to try this crime. This alſo ſometimes happens in civil cauſes; witneſs the juriſdiction given by act of parliament to the juſtices of peace in revenue-matters. With relation to ſuch courts, the queſtion of the greateſt importance is, Whether they be ſubject to any review. The author of A new abridgement of the law *, talking of the king's-bench, has the following paſſage. "Alſo it hath ſo "ſovereign a juriſdiction in all criminal mat-"ters, that an act of parliament, appointing "all crimes of a certain denomination to be "tried before certain judges, doth not exclude "the juriſdiction of this court, without expreſs "negative

* Vol. 1. p. 592.

" negative words. And therefore it hath been " reſolved, that 33d Henry VIII. cap. 12. which " enacts, *That all treaſons within the King's* " *houſe ſhall be determined before the Lord* " *Steward*, doth not reſtrain this court from " proceeding againſt ſuch offences. But where " a ſtatute creates a new offence, which was " not taken notice of by the common law, e- " rects a new juriſdiction for the puniſhment of " it, and preſcribes a certain method of pro- " ceeding; it ſeems queſtionable how far this " court has an implied juriſdiction in ſuch a " caſe." The diſtinction here ſuggeſted, with ſome degree of heſitation, is, in my apprehenſion, ſolidly founded on a clear rule of law. A right eſtabliſhed in any court, or in any perſon, is not preſumed to be taken away; and therefore cannot otherwiſe be taken away but by expreſs words. On the other hand, a right is not preſumed to be given, and therefore cannot be given, but by expreſs words. Treaſon of all ſorts, where-ever committed, is under the juriſdiction of the king's-bench; and a ſtatute impowering the Lord Steward to try treaſon committed within the King's houſe, beſtows upon him, in this particular, a cumulative juriſdiction with the king's-bench; but not an excluſive juriſdiction, becauſe the words do not neceſſarily imply ſo much. A new offence created by a ſtatute, muſt be conſidered in a different

different light. If the trial of ſuch offence be committed to a particular judge, there is no foundation in law for extending the privilege to any other judge; becauſe the words do not neceſſarily import ſuch extenſion. The juſticiary therefore, or ſheriff, have no power to inflict the ſtatutory puniſhment upon thoſe who maliciouſly deſtroy growing trees. They have no ſuch juriſdiction by the ſtatute; and they cannot have it by common law, becauſe the puniſhment is not directed by common law.

One queſtion there is relative to courts of all kinds, How is the extent of their juriſdiction to be tried, and who is the judge in this caſe? This is a matter of no difficulty. It is inherent in the nature of every court, to judge of its own juriſdiction, and, with reſpect to every cauſe brought before it, to determine whether it comes or comes not under its cogniſance. For to ſay, that this queſtion, even at the firſt inſtance, muſt be determined by another court, involves the following abſurdity, that no cauſe can be taken in by any court, till antecedently it be found competent by the judgment of a ſuperior court. This therefore is one civil queſtion, to which every court, civil, criminal, or eccleſiaſtical, muſt be competent. As this preliminary queſtion, before entering upon the cauſe, muſt be determined if diſputed, or be taken for granted if not diſputed, the power to judge

judge of it muſt neceſſarily be implied, wherever a court is eſtabliſhed and a juriſdiction granted. A judgment, however, of a court upon its own powers, ought never to be final; which in effect would empower a court, however limited in its conſtitution, to arrogate to itſelf an unbounded juriſdiction, which would be abſurd. This doctrine ſhall be illuſtrated, by applying it to a very plain caſe, debated in the court of ſeſſion. In the turnpike-act for the ſhire of Haddington, 23d George II. the truſtees are empowered to make compoſitions with individuals for their toll. Any abuſe with-all of the powers given by the act, is ſubjected to the cogniſance of the juſtices of peace, who are authoriſed to rectify the ſame ultimately and without appeal. The truſtees made a tranſaction with a neighbouring heritor, allowing thoſe who purchaſed his coal and ſalt the uſe of the turnpike-road free of toll; but obliging him to pay L. 3 Sterling yearly, whenever he ſhould open coal in a different field ſpecified. This bargain, an exemption in reality, not a compoſition, was complained of as an abuſe; and as ſuch was, by the juſtices of peace, declared void, and the toll ordered to be levied. The queſtion was, Whether this ſentence could be reviewed by the court of ſeſſion. The queſtion admits of a clear ſolution, by ſplitting the ſentence into its two conſtituent parts, the firſt reſpecting

ſpecting the juriſdiction, the other reſpecting the cauſe. With regard to the laſt only, are the ſentences of the juſtices of peace declared final. With regard to the firſt, aſcertaining their own juriſdiction, their judgment is not final. The cauſe therefore may be brought before the court of ſeſſion to try this preliminary point; and if, upon a review, it be judged that the juſtices have exceeded the limits of their juriſdiction, the judgment they have given in the cauſe muſt alſo be declared void, as *ultra vires*.

On the other hand, if the opinion of the juſtices about their own juriſdiction be affirmed, the court of ſeſſion muſt ſtop ſhort; and however wrong the judgment upon the cauſe may to them appear, they cannot interpoſe, becauſe the judgment is final.

I ſhall finiſh this diſcourſe with a comparative view of our different chief courts in point of dignity and pre-eminence. The court of ſeſſion is ſovereign and ſupreme: Sovereign, becauſe it is the King's court; and it is the King who executes the acts and decrees of this court: Supreme, with reſpect to inferior courts having the ſame or part of the ſame juriſdiction, but ſubjected to a review in this court. The court of juſticiary, in the foregoing reſpects, ſtands preciſely upon the ſame footing with the court of ſeſſion. The court of exchequer is ſovereign, but not ſupreme: I know no inferior court

court with which it has a cumulative juriſdiction, and whoſe proceedings it can review: cauſes cannot be brought before the exchequer from any inferior court, whether by reduction, advocation, or appeal. The admiral-court is by the act 1681, declared ſovereign; and accordingly every act of authority of this court goes in the King's name. It is alſo ſupreme with reſpect to inferior admiral-courts, whoſe ſentences it can review. But with regard to the courts of ſeſſion and juſticiary, it is an inferior court, becauſe its decrees are ſubjected to a review in theſe courts. The commiſſary-court of Edinburgh is properly the biſhop's court, and not ſovereign. With reſpect to its ſupremacy, it ſtands upon the ſame footing with the admiral-court.

U TRACT

TRACT VIII.

BRIEVES.

JUriſdiction was originally extremely ſimple. The chieftain who led the hord or clan to war, was naturally appealed to in all controverſies among individuals.

Juriſdiction included not then what it doth at preſent, viz. a privilege to declare what is law, and authority to command obedience. It included no more but what naturally follows when two perſons differ in matter of intereſt, which is to take the opinion of a third.

Thus a judge originally was merely an umpire or arbiter, and litigation was in effect a ſubmiſſion; on which account litiſconteſtation is, in the Roman law, defined a *judicial contract* *.

The chieftain, who upon the union of ſeveral clans for common defence got the name of King, was the ſole judge originally in matters of importance (1). Slighter controverſies were determined

* See p. 20.

(1) Cæſar deſcribing the Germans and their manners: "Quum bellum civitas aut illatum defendit, aut infert; "magiſtratus, qui ei bello preſint, ut vitæ neciſque ha- "beant

determined by fellow-ſubjects; and perſons diſtinguiſhed by rank or office, were commonly choſen umpires.

But differences multiplying by multiplied connections, and cauſes becoming more intricate by the art of ſubtilizing, the ſovereign made choice of a council to aſſiſt him in his awards; and this council was denominated, *the King's Court*; becauſe in it he always preſided. Through moſt of the European nations, at a certain period of their progreſs, we find this court eſtabliſhed.

In the progreſs of ſociety, matters of juriſdiction becoming ſtill more complex and multiplying without end, the ſovereign, intent on the greater affairs of government, had not leiſure nor ſkill to decide differences among his ſubjects. Law became a ſcience. Courts were inſtituted; and the ſeveral branches of juriſdiction, civil, criminal, and eccleſiaſtical, were diſtributed among theſe courts: Their powers were aſcertained, and the cauſes that could be tried by each. Theſe were likewiſe called the King's courts; not only as being put in place of the King's court properly ſo called, but alſo as the King did not renounce the power of

 judging

"beant poteſtatem, diliguntur. In pace nullus commu-
"nis eſt magiſtratus, ſed principes regionum atque pa-
"gorum inter ſuos jus dicunt, controverſiaſque minuunt."
Commentaria, lib. 6.

judging in perſon, but only freed himſelf from the burden of neceſſary attendance.

But the ſovereign, jealous of his royal authority, beſtowed upon theſe courts no other power but that of juriſdiction in its ſtricteſt ſenſe, viz. a power to declare what is law. He reſerved to himſelf all magiſterial authority, even that which is neceſſary for explicating the juriſdiction of a court. Therefore, with relation to ſovereign courts, citation and execution proceed in the King's name, and by his authority.

As to inferior courts, all authority is given to them that is neceſſary for explicating their juriſdiction. The truſt is not great, conſidering that an appeal lies to the ſovereign court; and it is below the dignity of the crown, to act in an inferior court.

In the infancy of government, the danger was not perceived, of truſting with the King both the judicative and executive powers of the law. But it being now underſtood, that the ſafety of a free government depends on balancing its ſeveral powers, it has become an eſtabliſhed maxim, That the King, with whom the executive part of the law is truſted, has no part of the judicative power. "It ſeems now a-"greed, that our kings having delegated their "whole judicial power to the judges of their "ſeveral courts, they, by the conſtant and un-"interrupted uſage of many ages, have now

"gained

" gained a known and ſtated juriſdiction, re-
" gulated by certain eſtabliſhed rules, which
" our kings themſelves cannot make any alte-
" ration in, without an act of parliament *."
The ſame is underſtood to be the law of Scotland, though as late as Craig's time it was otherwiſe. That author † mentions a caſe, where it was declared to be law, that the King might judge even in his own cauſe.

Religion and law, originally ſimple, were ſtrangers to form. In proceſs of time, form uſurped on ſubſtance, and law as well as religion were involved in formalities. What is ſolemn and important, produceth naturally order and form among the vulgar, who are addicted to objects of ſenſe. For this reaſon, forms in moſt languages are named *ſolemnities*, being connected with things that are ſolemn. But by gradual improvements in ſociety, and by refinement of taſte, forms come inſenſibly to be neglected, or reduced to their juſt value; and law as well as religion are verging toward their original ſimplicity. Thus, oppoſite cauſes produce ſometimes the ſame effect. Law and religion were originally ſimple, becauſe man was ſo. They will again be ſimple, becauſe ſimplicity contributes to their perfection.

* New abridgement of the law, vol. 1. p. 554.

† L. 3. dieg. 7. § 12.

After courts were inſtituted, the various cauſes at that time known were diſtributed among them. But new grounds of action occurring, it became often doubtful in what court a new action ſhould be tried. An expeditious method was invented, for reſolving ſuch doubts. The King was the fountain of juriſdiction, and under his prerogative fell naturally the power of delegating to what judge he thought proper, any cauſe of this kind that occurred. This was done by a brieve from the chancery, directed to ſome eſtabliſhed judge, ordering him to try the particular cauſe mentioned in the brieve. The King at firſt was under no reſtraint as to the choice of the judge; provided only, the party who was to be defendant, was ſubjected to the juriſdiction of the judge named in the brieve. This limitation was neceſſary; becauſe the King's brieve contained not a warrant for citing the party to appear before the judge; and the judge's warrant could not reach beyond his territority. But in time, reaſon produced cuſtom, and cuſtom became law. Matters of moment were always delegated to a ſupreme judge; and, in general, the rule was, to avoid mixing civil and criminal juriſdiction.

In the moſt general ſenſe of the word, every one of the King's writs, commanding or prohibiting any thing to be done, is termed a *brieve*. Brieves, with reſpect to judicial proceedings, are

are of two kinds. One is directed to the ſheriff, or a meſſenger in place of the ſheriff, ordering him to cite the party to appear in the King's court, to anſwer the complaint made againſt him. This brieve is in the Engliſh law termed an *original*; and correſponds to our ſummons including the libel. The other kind is that above mentioned, directed to a judge, delegating to him the power of trying the particular cauſe ſet forth in the brieve.

Of the firſt kind of brieve, that for breaking the King's protection, is an inſtance *. Of the other kind, the brieve of bondage, the brieve of diſtreſs, the brieve of mortanceſtry, the brieve of nouvel diſſeiſin, of perambulation, of terce, of right, &c. are inſtances.

Of the laſt-mentioned brieve the following was a peculiar ſpecies. When in the King's court a queſtion of baſtardy occurred, to which a civil court is not competent, a brieve was directed from the chancery to the biſhop, to try the baſtardy as a prejudicial queſtion †. If ſuch a caſe happened in an inferior court, the court, probably by its own authority, made the remit to the ſpiritual court. And the ſame being done at preſent in the King's courts, there is no longer any uſe for this brieve.

* Quon. attach. cap. 54.

† Reg. Maj. l. 2. cap. 50.

The brieve of bondage might be directed either to the juſticiar, or to the ſheriff *. The brieve for relief of cautionry, might be directed to the juſticiar, ſheriff, or provoſt and bailies within burgh †. The brieves of mortanceſtry, and of nouvel diſſeiſin, could only be directed to the juſticiar ‡.

The brieve of diſtreſs, correſponding to the Engliſh brieve *Juſticies*, muſt be examined more deliberately, becauſe it makes a figure in our law. While the practice ſubſiſted of poinding *brevi manu* for payment of debt, there was no neceſſity for the interpoſition of a judge to force payment ||. When courts therefore were inſtituted, a proceſs for payment of debt was not known. The rough practice of forcing payment by private power being prohibited, an action became neceſſary; and the King interpoſed by a brieve, directing one or other judge to try the cauſe; "The brieve of diſtreſs for "debts ſhall be determined before the juſticiar, "ſheriff, bailies of burghs, as it ſhall pleaſe the "King by his letter to command them parti-"cularly within their juriſdiction **." And it may be remarked by the way, that when a decree was recovered under the authority of this brieve,

* Quon. attach. cap. 56. † Idem, cap. 51.

‡ Idem, cap. 52. & 53.

|| See Tract 4. *Hiſtory of ſecurities upon land for payment of debt.*

** Reg. Maj. l. 1. cap. 5.

brieve, the judge directed execution by his own authority, adjudging to the creditor for his payment, the land of the debtor if the moveables were not ſufficient. With regard to the ſheriff at leaſt, the fact is verified by the act 36. parl. 1469. This brieve explains a maxim of the common law of England; "Quod placita de "catallis, debitis, &c. quæ ſummum 40 s. at-"tingunt vel excedunt, ſecundum legem et "conſuetudinem Angliæ ſine brevi regis placi-"tari non debent *." The indulging a juriſdiction to the extent of 40 s. without a brieve, aroſe apparently from the hardſhip of compelling a creditor to take out a brieve for a ſum ſo ſmall. In England the law continues the ſame to this day; for the ſheriff, without a brieve, cannot judge in actions of debt beyond 40 s. But in Scotland, an original juriſdiction was by ſtatute beſtowed upon the Lords of Seſſion, to judge in actions of debt †; and the ſheriff and other inferior judges, copying after this court, have by cuſtom and preſcription acquired an original juriſdiction in actions of debt, without limitation; and the brieve of diſtreſs is no longer in uſe, becauſe no longer neceſſary.

After the ſame manner, moſt of theſe brieves have gone into deſuetude; for to nothing are we more prone than to enlargement of power.

A

* New abridgement of the law, vol. 1. p. 646.

† Act 61. parl. 1457.

A court that has often tried cauſes by a delegated juriſdiction, loſes in time ſight of its warrant, and ventures to try ſuch cauſes by its own authority. Some few inſtances there are of ſuch brieves ſtill in force; viz. thoſe which found the proceſs of diviſion of lands, of terce, of lyning within burgh, and of perambulation. For this reaſon I think it wrong in the court of ſeſſion to ſuſtain a proceſs of perambulation at the firſt inſtance, which ought to be carried on before the ſheriff, upon the authority of a brieve from the chancery. And what the rather inclines me to be of that opinion, is, that all the brieves of this ſort preſerved in uſe, regard either the fixing of land-marches, or the diviſion of land among parties having intereſt, which never can be performed to good purpoſe, except upon the ſpot.

Soon after the inſtitution of the college of juſtice, it was made a queſtion, Whether that court could judge in a competition about the property of land, without being authoriſed by a brieve of right. But they got over the difficulty upon the following conſideration: "That "the brieve of right was long out of uſe; and "that this being a ſovereign and ſupreme court "for civil cauſes, its juriſdiction, which in its "nature is unlimited, muſt comprehend all ci-"vil cauſes from the loweſt to the higheſt *."

As

* Ult. February 1542, Wemyſs *contra* Forbes, obſerved by Skene, *voce Breve de recto.*

As the King's writs iſſuing from chancery did paſs under either the great or the quarter ſeal, ſuch ſolemnity came to be extremely burdenſome, and was ſeverely felt in the multiplication of law-proceedings. This circumſtance had great influence in antiquating the brieves that conferred a delegated juriſdiction, and in bringing all cauſes under ſome one original juriſdiction. The other ſort of brieve, which is no other than the King's warrant to call the defendant into the King's court, has been very long in diſuſe; and inſtead of it a ſimpler form is choſen, which is a letter from the King, paſſing under the ſignet, directed to the ſheriff, or to a meſſenger in place of the ſheriff, ordering him to cite the party to appear in court. This change happened probably without an expreſs regulation: a few ſingular inſtances which were ſucceſsful, diſcovered the conveniency; and inſtances were multiplied, till the form became univerſal, and brieves from the chancery were totally neglected. One thing is certain, that letters under the ſignet for citing parties to appear in the King's courts, can be traced pretty far back. In the chartulary of Paiſley, preſerved in the Advocate's library *, there is a full copy of a libelled ſummons in Engliſh, dated the 2d February 1468, at the inſtance of George Abbot of Paiſley, againſt the bailies of the

* p. 246.

the burgh of Renfrew, with reſpect to certain tolls, cuſtoms, privileges, &c. for ſummoning them to appear before the King and his council, at Edinburgh, or where it ſhall happen them to be for the time, ending thus: "Given under our ſignet at Perth, the ſecond of December, and of our reign the eight year." And there are extant letters under the ſignet *, containing a charge to enter heir to the ſuperiority, and infeft the vaſſal within twenty days; and, if he fail, ſummoning him to appear before the Lords of Council the ſeventh of July next, to hear him decerned to tyne his ſuperiority, and that the vaſſal ſhall hold of the next lawful ſuperior. "Given under our ſignet at Stirling, the ſecond of June, and of our reign the firſt year." It is to be obſerved, at the ſame time, that this muſt have been a recent innovation; for ſo late as the year 1457, the ordinary form of citing parties to appear before the Lords of Seſſion, was by a brieve iſſued from chancery †.

It is probable, that originally every ſort of execution that paſſed upon the decrees of the King's courts, was authoriſed by a brieve iſſuing from chancery; for if a brieve was neceſſary to bring the defendant into court, leſs ſolemnity would not be ſufficient in executing the decree pronounced againſt him; and that this in particular

* 2d June 1514. † See act 62. parl. 1457.

particular was the caſe when land was appriſed for payment of debt, is teſtified by 2d Statutes Robert I. cap. 19. At what time this form was laid aſide, or upon what occaſion, we know not. For as far back as we have any records, we find every ſort of execution, perſonal and real, upon the decrees of the King's courts, authoriſed by letters paſſing the ſignet.

Of old, a certain form of words was eſtabliſhed for every ſort of action; and if a man could not bring his caſe under any eſtabliſhed form, he had no remedy. In the Roman law, theſe forms are termed *formulæ actionum*. In Britain, copying from the Roman law, all the King's writs or brieves, thoſe at leaſt that concern judicial proceedings, are in a ſet form of words, which it was not lawful to alter. But in the progreſs of ſociety, new caſes occurring without end to which no eſtabliſhed form did correſpond, the Romans were forced to relax from their ſolemnities, by indulging *actiones in factum;* in which the fact was ſet forth without reference to any form. The Engliſh follow this practice in their *actions upon the caſe*. It is probable, that, in Scotland, the warrant for citation paſſing under the ſignet, was at firſt conceived in a ſet form; in imitation of the brieve to which it was ſubſtituted. But if ſo, the practice did not long continue. Theſe forms have been very long neglected, every man being at liberty

liberty to set forth his case in his own words; and it belongs to the court to consider, whether the libel or declaration be *relevant*; or, in other words, whether the facts set forth be a just cause for granting what is requested by the pursuer.

TRACT

TRACT IX.

PROCESS IN ABSENCE.

IN Scotland, the forms of proceſs againſt abſents, in civil and criminal actions, differ too remarkably to paſs unobſerved. Our curioſity is excited to learn whence the difference has ariſen, and upon what principle it is founded; and for gratifying curioſity in this particular, I can think of no means more promiſing, than a view of ſome foreign laws that have been copied by us.

But in order to underſtand the ſpirit of theſe laws, it will be neceſſary to look back upon the origin of civil juriſdiction, of which I have had occaſion, in a former tract, to give a ſketch *; viz. that at firſt judges were conſidered as arbiters, without any magiſterial powers: That their authority was derived from the conſent of the litigants: That litiſconteſtation was in reality a contract; and therefore, that the decrees of judges had not a ſtronger effect than an award pronounced by an arbiter properly ſo called. Upon this ſyſtem of juriſdiction, there cannot

* Hiſtory of the Criminal Law.

cannot be ſuch a thing as a proceſs in abſence; for a judge, whoſe authority depends on conſent, cannot give judgment againſt any perſon who ſubmits not to his juriſdiction. But civil juriſdiction, like other human inventions, weak and imperfect at its commencement, was improved in courſe of time, and became a more uſeful ſyſtem. After a public was recogniſed, with a power in the public to give laws to the ſociety and to direct its operations, the conſent of litigants was no longer neceſſary to found juriſdiction. A judge is held to be a public officer, having authority to ſettle controverſies among individuals, and to oblige them to ſubmit to his decrees. The defendant, bound to ſubmit to the authority of the court, cannot hurt the purſuer by refuſing to appear; and hence a proceſs in abſence againſt a perſon who is legally cited.

In the primitive ſtate of Rome, juriſdiction was altogether voluntary. A judge had no coercive power, not even that of citation. The firſt dawn of authority diſcovered in old Rome with relation to judicial proceedings, is a power which was given to the claimant to drag his party into court, *obtorto collo*, as expreſſed in the Roman law; which was a very rude form, ſuitable however to the ignorance and rough manners of thoſe times. This glimpſe of authority was improved, by transferring the power of forcing

cing a defendant into court from the claimant to the judge; and this was a natural tranſition, after a judge was held to be a public officer, veſted with every branch of authority that is neceſſary to explicate his juriſdiction. Litiſconteſtation ceaſed to be a contract. But as our notions do not inſtantly accommodate themſelves to the fluctuation of things, litiſconteſtation continued to be handled by lawyers as a contract, long after juriſdiction was authoritative, and neither inferred nor required conſent. Litiſconteſtation, it is true, could no longer be reckoned a contract; but to deviate as little as poſſible from ancient maxims, it was defined to be a *quaſi* contract; which in plain language is ſaying, that it hath nothing of a contract except the name. We return to the hiſtory. The power of citation aſſumed by the judge, was at firſt, like moſt innovations, exerciſed with remarkable moderation. In civil cauſes, four citations were neceſſary in order to oblige the defendant to put in his anſwer. The fourth citation was peremptory, and carried the following certification: "Etiam abſente diverſa parte, cogniturum ſe, et pronunciaturum *." What followed is diſtinctly explained. "Et poſt edictum peremptorium impetratum, cum dies ejus ſupervenerit, tunc abſens citari debet: et ſive reſponderit ſive non

* l. 71. De judiciis.

" non reſponderit, agetur cauſa, et pronuncia-
" bitur: non utique ſecundum præſentem, ſed
" interdum vel abſens, ſi bonam cauſam ha-
" buit, vincet *."

In criminal actions, the form of proceeding againſt abſents, appears not, among the Romans, to have been thoroughly ſettled. Two reſcripts of the Emperor Trajan are founded on, to prove that no criminal ought to be condemned in abſence. And becauſe a proof *ex parte* cannot afford more than a ſuſpicion or preſumption, the reaſon given is, " Quod fa-
" tius eſt impunitum relinqui facinus nocentis,
" quam innocentem damnare." On the other hand, it is urged by ſome writers, that contumacy, which itſelf is a crime, ought not to afford protection to any delinquent; and therefore that a criminal action ought to be managed like a civil action. Ulpian, to reconcile theſe two oppoſite opinions, labours at a diſtinction: admits, as to leſſer crimes, that a perſon accuſed may be condemned in abſence; but is of opinion, that of a capital crime no man ought to be condemned in abſence †. Marcian ſeems to be of the ſame opinion ‡. And it is laid down, that the criminal's whole effects, in this caſe, were inventaried and ſequeſtred; to the effect, that if within the year he did not appear to

* l. 73. De judiciis. † l. 5. De pœnis.
‡ l. 1. pr. et § 1. De requir. vél abſen. damnan.

to purge his contumacy, the whole ſhould be confiſcated *.

This form of proceeding, as to civil actions at leaſt, appears to have a good foundation both in juſtice and expediency. If my neighbour refuſe to do me juſtice, it is the part of the judge or magiſtrate to compel him. If my neighbour be contumacious and refuſe to ſubmit to legal authority, this may ſubject him to puniſhment, but cannot impair my right. In criminal cauſes, where puniſhment alone is in view, there is more ground for heſitating. No individual hath an intereſt ſo ſubſtantial, as to make a proſecution neceſſary merely on his account; and therefore writers of a mild temper, ſatisfy themſelves with puniſhing the perſon accuſed for his contumacy. Others, of more ſevere manners, are for proceeding to a trial in every caſe that is not capital.

That a difference ſhould be eſtabliſhed between civil and criminal actions in the form of proceeding, is extremely rational. I cannot, however, help teſtifying ſome degree of ſurpriſe, at an opinion that gives peculiar indulgence to the more atrocious crimes. I ſhould rather have expected, that the horror we naturally have at ſuch crimes, would have diſpoſed theſe writers to break through every impediment, in order to reach a condign puniſhmeut; leaving

* viz. in the title now mentioned.

crimes that make a leſs figure, to be proſecuted in the ordinary form. Nature and plain ſenſe undoubtedly ſuggeſt this difference. But theſe matters were at Rome ſettled by lawyers, who are led more by general principles, than by plain feelings. And as the form of civil actions was firſt eſtabliſhed, analogy moved them to bring pecuniary mulcts, and conſequently all the leſſer crimes, under the ſame form.

I reckon it no ſlight ſupport to the foregoing reflection, that as to high treaſon, the greateſt of all crimes, the Roman lawyers, deſerting their favourite doctrine, permitted this crime to be proſecuted, not only in abſence of the perſon accuſed, but even after death *.

As far back as we can trace the laws of this iſland, we find judges veſted with authority to explicate their juriſdiction. We find, at the ſame time, the original notion of juriſdiction ſo far prevalent, as to make it a rule, that no cauſe could be tried in abſence; which to this day continues to be the law of England. This rule is unqueſtionably a great obſtruction to the courſe of juſtice. For inſtead of trying the cauſe, and awarding execution when the claim is found juſt, it has forced the Engliſh courts upon a wide circuit of pains and penalties. The refuſing to ſubmit to the juſtice of a court inveſted with legal authority, is a crime of the groſſeſt

* l. 11. Ad leg. Jul. Majeſt.

groſſeſt nature, being an act of rebellion againſt the ſtate. And it is juſtly thought, that the perſon who refuſes to ſubmit to the laws of his country, ought not to be under the protection of theſe laws. Therefore, this contempt and contumacy, in civil actions as well as criminal, ſubjects the party to divers forfeitures and penalties. He is held to be a rebel or outlaw: He hath not *perſonam ſtandi in judicio;* he may be killed *impune;* and both his liferent and ſingle eſcheat fall.

In Scotland, we did not originally try even civil cauſes in abſence, more than the Engliſh do at preſent. The compulſion to force the defendant to appear, was attachment of his moveables, to the poſſeſſion of which he was reſtored on finding bail to ſiſt himſelf in court. If he remained obſtinate and offered not bail, the goods attached were delivered to the claimant, who remained in poſſeſſion till the proprietor was willing to ſubmit to a trial. This is plainly laid down in the caſe of the brieve of right, or declarator of property: If the defendant remain contumax, and neither appear nor plead an eſſoinzie, the land in controverſy is ſeized and ſequeſtered in the King's hands, there to remain for fifteen days; if the defendant appear within the fifteen days, he recovers poſſeſſion on finding caution to anſwer as law will; otherwiſe the land is adjudged to the purſuer;

after which the defendant has no remedy but by a brieve of right *. Neither appears there to be any ſort of cognition in other civil cauſes, ſuch as actions for payment of debt, for performance of contracts, for moveable goods; where the firſt ſtep was to arreſt the defendant's moveables, till he found caution to anſwer as law will †. And in theſe caſes, as well as in the brieve of right, the goods attached were, no doubt, delivered to the claimant, to be poſſeſſed by him while his party remained contumacious.

After the Roman law prevailed in this part of the iſland, the foregoing practice wore out, and, with regard to civil actions, gave place to a more mild and equitable method, which, without ſubjecting the defendant to any penalty, is more available to the purſuer. This method is to try the cauſe in abſence of the defendant, in the ſame manner as was done in Rome, of which mention is made above. The relevancy is ſettled, proof taken, and judgment given, preciſely as where the defendant is preſent. The only inconvenience of this method upon its introduction, was the depriving the purſuer of the defendant's teſtimony, when he choſe to refer his libel to the defendant's oath. This was remedied by holding the defendant as confeſſed

* Reg. Maj. l. 1. cap. 7.

† Quon. attach. cap. 1. cap. 49. § 3.

confeſſed on the libel. To explain this form, I ſhortly premiſe, that by the old law of this iſland, it was reckoned a hardſhip too great, to oblige a man to give evidence againſt himſelf; and for that reaſon the purſuer, even in a civil action, was denied the benefit of the defendant's evidence. In Scotland, the authority of the Roman law prevailing, which, in the particular now mentioned, was more equitable than our old law, it was made a rule, that the defendant in a civil action is bound to give evidence againſt himſelf; and if he refuſe, he is held as confeſſing the fact alledged by the purſuer. This practice was copied in a proceſs where the defendant appears not; and from this time the contumacy of the defendant who obeys not a citation in a civil cauſe, has been attended with no penal conſequence; for a good reaſon, that the purſuer hath a better method for attaining his end, which is, to inſiſt that the defendant be held as confeſſed on the libel. Nor is this a ſtretch beyond reaſon; for the defendant's acquieſcence in the claim may juſtly be preſumed, from his refuſing to appear in court.

But this new form is defective in one particular caſe. We hold not a party as confeſt, unleſs he be cited perſonally. What if one, to avoid a perſonal citation, keep out of the way? is there no remedy in this caſe? why not recur

to the ancient practice of attaching his effects, till he find caution to answer?

The Engliſh regulation, that there can be no trial in abſence, holds in criminal as well as in civil cauſes, not even excepting a proſecution for high treaſon. But as this crime will never be ſuffered to go unpuniſhed, a method has been invented, which by a circuit ſupplies the defect of common law. If a party accuſed of treaſon or felony, contemptuouſly keep out of the way; the crime, it is true, cannot be tried; but the perſon accuſed may be outlaw'd for contumacy; and the outlawry brings about the end propoſed by the proſecution; for though outlawry, by common law, hath no effect, as above obſerved, beyond that of a denunciation upon a horning with us; yet the horror of ſuch offences hath introduced a new regulation, that outlawry in the caſe of felony, ſubjects the party to that very puniſhment which is inflicted upon a felon convict; and the like in treaſon, corruption of blood excepted. There is no occaſion to make any circuit with relation to other crimes. For the puniſhment of outlawry by common law equals the puniſhment of any crime, treaſon and felony excepted.

Hence the reaſon why death before trial, is, in England, a total bar to all forfeitures and penalties, even for high treaſon. The crime cannot

cannot be tried in abſence; and after death there can be no contempt for not appearing.

Lawyers have not always a happy talent for reformation; for they ſeldom ſearch to the root of the evil. In the caſe before us, a ſuperſtitious attachment to ancient forms, hath led Engliſh lawyers into a glaring abſurdity. To prevent the hazard of injuſtice, there muſt not be a trial in abſence of the perſon accuſed. Yet no difficulty is made to preſume an abſent man guilty without a trial, and to puniſh him as if he had been fairly tried and condemned. This is in truth converting a privilege into a penalty, and holding the abſent guilty, without allowing them the benefit of a trial. The abſurdity of this method is equally glaring in another particular. It is not ſufficient that the defendant appear in court; it is neceſſary that he plead, and put himſelf upon a trial by his country. The Engliſh adhere ſtrictly to the original notion, that a proceſs implies a judicial contract, and that there can be no proceſs unleſs the defendant ſubmit to have his cauſe tried. Upon this account it is an eſtabliſhed rule, that the perſon accuſed who ſtands mute or refuſes to plead cannot be tried. To this caſe a peculiar puniſhment is adapted, diſtinguiſhed by the name of *peine fort et dure*; the perſon accuſed is preſſed to death. And there are inſtances on record, of perſons ſubmitting to this puniſhment,

ment, in order to ſave their land-eſtates to their heirs, which in England are forfeited in ſome caſes of felony, as well as in high treaſon. But here again high treaſon is an exception. Standing mute in this caſe is attended with the ſame forfeiture, which is inflicted on a perſon attainted of high treaſon.

We follow the Engliſh law ſo far as that no crime can be tried in abſence. Some exceptions to this rule were once indulged, which ſhall be mentioned by and by. But we at preſent adhere ſo ſtrictly to the rule, that a decree in abſence, obtained by the procurator-fiſcal before an inferior court for a bloodwit upon full proof, was reduced; "the Lords being of opi-"nion, that a decreet in abſence could not "proceed; and that the judge could go no fur-"ther, than to fine the party for contumacy, "and to grant warrant to apprehend him, till "he ſhould find caution to appear perſonal-"ly *."

It is certainly a defect in our law, that voluntary abſence ſhould be a protection againſt the puniſhment of atrocious crimes. Excepting the crime of high treaſon, in which the Engliſh regulation hath now place with us, the puniſhment of outlawry, whatever the crime be, never goes farther than ſingle and liferent eſcheat. As

* Dalrymple, 19th July 1715, Procurator-fiſcal *contra* Simpſon.

As to the trial of a crime after death, which the Roman law indulged in the caſe of treaſon, there are two reaſons againſt it. The chief is, that whether the crime be committed againſt the public or againſt a private perſon, reſentment, the ſpring and foundation of puniſhment, ought to be buried with the criminal; and, in fact, never is indulged by any perſon of humanity, after the criminal is no more. The other is, that the relations of the deceaſed, unacquainted with his private hiſtory, have not the ſame means of juſtification, which to himſelf, it may be ſuppoſed, would have been an eaſy taſk. Upon this account, the indulging criminal proſecutions after death, would open a door to grievous oppreſſion. In a country where ſuch is the law, no man can be ſecure, that his heirs ſhall inherit his fortune. With reſpect, however, to treaſon, it ſeems reaſonable, that in ſome ſingular caſes it ought to be excepted from the rule. If a man be ſlain in battle, fighting obſtinately againſt an eſtabliſhed government, there is no inhumanity in forfeiting his eſtate after his death; nor can ſuch a privilege in the crown, confined to the caſe now mentioned, be made an engine of oppreſſion, conſidering the notoriety of the fact. And indeed it carries no ſlight air of abſurdity, that the moſt daring acts of rebellion, viz. riſing in arms againſt a lawful ſovereign and oppoſing him

him in battle, ſhould, if death enſue, be out of the reach of law; for dying in battle, honourably in the man's own opinion and in that of his aſſociates, can in no light be reckoned a puniſhment. This in reality is a great encouragement to perſevere in rebellion. A man who takes arms againſt his country, where ſuch is the law, can have no true courage, if he lay them down, till he either conquer or die. This juſtifies the Roman law, which countenanced a trial of treaſon after death, confined expreſsly to the caſe now mentioned. "Is, qui in reatu "decedit, integri ſtatus decedit. Extinguitur e- "nim crimen mortalitate, niſi forte quis maje- "ſtatis reus fuit; nam hoc crimine, niſi a ſuc- "ceſſoribus purgetur, hereditas fiſco vindica- "tur. Plane non quiſquis legis Juliæ majeſta- "tis reus eſt, in eadem conditione eſt; ſed qui "perduellionis reus eſt, hoſtili animo adverſus "rempublicam vel principem animatus: cæte- "rum ſi quis ex alia cauſa legis Juliæ majeſta- "tis reus ſit, morte crimine liberatur *."

The Roman law was copied, indiſcreetly indeeed, by our legiſlature, authoriſing, without any limitation, a proceſs for treaſon after the death of the perſon ſuſpected †. But the legiſlature, reflecting upon the danger of truſting with the crown a privilege ſo extraordinary, did,

* L. ult. Ad. leg. Jul. majeſt.

† Act 69. parl. 1540.

did, by an act in the year 1542, which was never printed, reſtrain this privilege within proper bounds. The words are: "And becauſe the "ſaids Lords think the ſaid act (viz. the act "1540) too general and prejudicial to all the "Barons of this realm; therefore ſtatutes and "ordains, that [the ſaid act ſhall have no place "in time coming, but againſt the airs of them "that notourly commits, or ſhall commit "crimes of leſe-majeſty againſt the King's per-"ſon, againſt the realm for everting the ſame; "and againſt them that ſhall happen to betray "the King's army, allenarly, it being notour-"ly known in their time; and the airs of theſe "perſons to be called and purſued within five "years after the deceaſe of the ſaid perſons "committers of the ſaid crimes; and the ſaid "time being by-paſt, the ſaids airs never to be "purſued for the ſame." (1)

A

(1) In the year 1609, Robert Logan of Reſtalrig was, after his death, accuſed in parliament, as acceſſory to the Earl of Gowrie's conſpiracy, and his eſtate was forfeited to the crown; though, in appearance at leaſt, he had died a loyal ſubject, and in fact never had committed any ouvert act of treaſon. Strange, that this ſtatute was never once mentioned during the trial, as ſufficient to bar the proſecution! Whether to attribute this to the undue influence of the crown, or to the groſs ignorance of our men of law at that period, I am at a loſs. Of one thing I am certain, that there is not to be found on record, another inſtance of ſuch flagrant injuſtice in judicial proceedings.

A proceſs of treaſon againſt an abſent perſon regularly cited, reſts upon a different footing. It is ſome preſumption of guilt, that a man accuſed of a crime, obſtinately refuſes to ſubmit himſelf to the law of his country; and yet the dread of injuſtice, or of falſe witneſſes, may, with an innocent perſon, be a motive to keep out of the way. This uncertainty about the motive of the perſon accuſed, ought to confine to the higheſt court every trial in abſence, that of treaſon eſpecially, where the perſon accuſed is not upon an equal footing with his proſecutors. And probably this would have been the practice in Scotland, but for one reaſon. The ſeſſions of our parliament of old, were generally too ſhort for a regular trial in a criminal cauſe. Upon this account, the trial of treaſon after death, was, from neceſſity rather than choice, permitted to the court of juſticiary. And this court which enjoyed the greater privilege, could entertain no doubt of the leſs, viz. that of trying treaſon in abſence. This latter power however being called in queſtion, the legiſlature thought proper to countenance it by an expreſs ſtatute; not indeed as to every ſpecies of treaſon in general, but only in the caſe of "treaſonable riſing in arms, and open and "manifeſt rebellion againſt his Majeſty *."

From

* Act 11. parl. 1669.

From this deduction it will be manifeſt, that the act 31. parl. 1690, reſcinding certain forfeitures in abſence pronounced by the court of juſticiary before the ſaid ſtatute 1669, proceeds upon a miſtake in fact, in ſubſuming, "That "before the year 1669, there was no law im- "powering the Lords of Juſticiary to forfeit in "abſence for perduellion." And yet this miſtake is made an argument, not indeed for depriving the court of juſticiary of the power in time coming, but for annulling all ſentences for treaſon pronounced in abſence by this court before the 1669. Theſe ſentences, it is true, proceeding from undue influence of miniſterial power, deſerved little countenance. But if they were iniquitous, it had been ſuitable to the dignity of the legiſlature to annul them for that cauſe, inſtead of aſſigning a reaſon that cannot bear a ſcrutiny. However this be, I cannot avoid obſerving, that the juriſdiction of the court of juſticiary to try in abſence open and manifeſt rebellion, is far from being irrational. And it is remarkable, that this was the opinion of our legiſlature, even after the revolution; for though they were willing to lay hold of any pretext to annul a number of unjuſt forfeitures, they did not however find it convenient to abrogate the ſtatute 1669, but left it in full force. Comparing our law in this particular with that of England, it appears to me, that the giving a fair

fair trial is preferable before the Engliſh method of annexing the higheſt penalties to an outlawry for treaſon, without any trial.

It remains only to be obſerved, that the Engliſh treaſon-laws being now extended to Scotland, the foregoing regulations for trying the crime of treaſon in abſence of the party accuſed or after his death, are at an end; and that the rule holds now univerſally that no crime can be tried in abſence. In England, no crime was ever tried in abſence, far leſs after death. The parliament itſelf did not aſſume that power; an attainder for high treaſon in abſence of the delinquent, proceeds not upon trial of the cauſe, but is of the nature of an outlawry for contumacious abſence. Nor is this form varied by the union of the two kingdoms; for the Britiſh parliament, as to all matters of law, is governed by the forms eſtabliſhed in the Engliſh parliament before the union. And I conjecture from the humanity of our preſent manners, that the treaſon laws will never be extended in Britain as they have been in Scotland, to forfeit an heir in poſſeſſion for a crime ſaid to have been committed by an anceſtor. I am not of opinion that ſuch a forfeiture is repugnant to the common rules of juſtice, when it is confined to the caſe above mentioned; and yet it is undoubtedly more beneficial for the inhabitants of this iſland, that by the mildneſs of our laws

ſome

ſome criminals may eſcape, than that an extraordinary power, which in perilous times may be ſtretched againſt the innocent, ſhould be lodged even in the ſafeſt hands. The national genius is far from favouring rigorous puniſhments, or any latitude in criminal proſecutions; of which there cannot be more illuſtrious evidence than the late acts of parliament, diſcharging all forfeiture of lands or hereditaments, even for high treaſon, after the death of the pretender and his two ſons *.

* 7th Ann. 20. and 17th Geo. II. 39.

TRACT X.

EXECUTION againſt Moveables and Land for payment of Debt.

AGAINST a debtor refractory or negligent, the proper legal remedy is to lay hold of his effects for paying his creditors. This is the method preſcribed by the Roman law *, with the following limitation, that the moveables, as of leſs importance than the land, ſhould be firſt ſold. But the Roman law was defective in one particular, that the creditor was diſappointed if no buyer was found. The defect is ſupplied by a reſcript of the Emperor †, appointing, that failing a purchaſer the goods ſhall be adjudged to the creditor by a reaſonable extent.

Among other remarkable innovations of the Feudal law, one is, that land was withdrawn from commerce, and could not be attached for payment of debt. Neither could the vaſſal be attached perſonally, becauſe he was bound perſonally to the ſuperior for ſervice. The moveables therefore, which were always the chief ſubject

* l. 15. § 2. De re judic. † l. 15. § 3. De re judic.

ſubject of execution, came now to be the only ſubject. In England, attachment of moveables for payment of debt, is warranted by the King's letter directed to the ſheriff, commonly called a *Fieri facias*; and this practice is derived from common law without a ſtatute. The ſheriff is commanded "to ſell as many of the debtor's "moveables as will ſatisfy the debt, and to re-"turn the money with the writ into the court "at Weſtminſter." The method is the ſame at this day, without any remedy where a purchaſer is not found.

Land, when left free to commerce by diſſolution of the feudal fetters, was of courſe ſubjected to execution for payment of debt. This was early introduced with relation to the King. For from the *Magna Charta* *, it appears to have been the King's privilege, failing goods and chattels, to take poſſeſſion of the land till the debt was paid. And from the ſame chapter it appears, that the like privilege is beſtowed upon a cautioner, in order to draw payment of what ſums he is obliged to advance for the principal debtor. By the ſtatute of merchants †, the ſame privilege is given to merchants; and by 13th Edw. I. cap. 18. the privilege is communicated to creditors in general; but with the following remarkable limitation, that they are allowed to poſſeſs the half only of the land.

* Cap. 8. † 13th Edward I.

By this time it was ſettled, that the military vaſſal's power of alienating, reached the half only of his freehold *; and it was thought incongruous, to take from the debtor by force of execution, what he himſelf could not diſpoſe of even for the moſt valuable conſideration. The laſt-mentioned ſtatute enacts, "That where "debt is recovered, or acknowledged in the "King's court, or damages awarded, it ſhall "be in the election of him that ſueth, to have "a *Fieri facias* unto the ſheriff, to levy the "debt upon the lands and chattels of the debtor; or that the ſheriff ſhall deliver to him all "the chattels of the debtor, (ſaving his oxen "and beaſts of his plough) and the one half of "his land, until the debt be levied upon a reaſonable extent; and if he be put out of the "land, he ſhall recover it again by writ of "nouvel diſſeiſin, and after that by writ of re-"diſſeiſin if need be." The writ authoriſed by this ſtatute, which, from the election given to the creditor, got the name of *Elegit*, is the only writ in the law of England that in any degree correſponds to our appriſing or adjudication. The operations, however, of theſe two writs are far from being the ſame. The property of land appriſed or adjudged is transferred to the creditor in ſatisfaction of his claim, if the debtor forbear to make payment for ten years;

* See abridgement of ſtatute law, tit. *Recognition*.

years; but an *Elegit* is a legal ſecurity only, having no effect but to put the creditor in poſſeſſion till the debt be paid, by levying the rents and profits. This is an inconvenient method of drawing payment (1). But at the time of the ſtatute, it was probably thought a ſtretch, to ſubject land at any rate to a creditor for his payment; and the Engliſh, tenacious of their cuſtoms, never think of making improvements, nor even of ſupplying legal defects; of which this ſtatute affords another inſtance, more inconvenient than that now mentioned. In England at preſent, land generally ſpeaking is totally under the power of the proprietor; and yet the ancient practice ſtill ſubſiſts, confining execution to the half, preciſely as in early times when the debtor could diſpoſe of no more but the half. Means however are contrived, indirect, indeed, to ſupply this palpable defect. Any other creditor is authoriſed to ſeize the half of

(1) For beſide the inconvenience of obtaining payment by parcels, it is not eaſy for the creditor in counting for the rents, to avoid a law-ſuit, which in this caſe muſt always be troubleſome and expenſive. It may alſo happen, that the rent exceeds not the intereſt of the money: muſt the creditor be ſatisfied with the poſſeſſion, without ever hoping to acquire the property? The common law aſſuredly affords him no remedy. But it is probable, that upon application by the creditor, the court of chancery, on a principle of equity, will direct the land to be ſold for payment of the debt.

the land left out of the firſt execution, and ſo on without end. Thus, by ſtrictly adhering to form without regarding ſubſtance, law, inſtead of a rational ſcience, becomes a heap of ſubterfuges and incongruities, which tend inſenſibly to corrupt the morals of thoſe who make law their profeſſion.

And here to prevent miſtakes, it muſt be obſerved, that the clauſe in the ſtatute, bearing, "That the ſheriff by a *Fieri facias* may levy "the debt upon the land and chattels of the "debtor," authoriſes not the ſheriff to deliver the land to the creditor, but only to ſell what is found upon the land, ſuch as corn or cattle, and to levy the rents which at the time of the execution are due by the tenants.

Letters of poinding in Scotland, correſpond to the writ of *Fieri facias* in England; but the defect above mentioned in the *Fieri facias*, is ſupplied in our execution againſt moveables according to its ancient form, which is copied from the Roman law. The execution was in the following manner: "The goods upon the "debtor's land, whether belonging to the ma"ſter or tenant, are carried to the market"croſs of the head burgh of the ſheriffdom, "and there ſold for payment of the debt. But "if a purchaſer be not found, goods are ap"priſed to the value of the debt, and deliver-

"ed

"ed to the creditor for his payment *." And here it muſt be remarked, that bating the rigour of ſelling the tenant's goods for the landlord's debt, this method is greatly preferable to that preſently in uſe, which enjoins not a ſale of the goods, but only that they be delivered to the creditor at appriſed values. This is unjuſt; becauſe inſtead of money, which the creditor is entitled to claim, goods are impoſed on him, to which he has no claim. But this is a trifle compared with the wrong done to the debtor by another branch of the execution that has crept into practice. In letters of poinding, a blank being left for the name of the meſſenger, the creditor is impowered to chuſe what meſſenger he pleaſes, and of conſequence to chuſe alſo the appretiators; by which means he is in effect both judge and party. In a practice ſo irregular, what can be expected but an unfair appretiation, always below the value of the goods poinded? And for graſping at this undue advantage, the creditor's pretext is but too plauſible, that contrary to the nature of his claim, he is forced to accept goods in lieu of money. Thus our execution againſt moveables in its preſent form, is irregular and unjuſt in all views. Wonderful, that contrary to the tendency of all public regulations toward perfection, this ſhould have gradually declined from

* Quon. attach. cap. 49.

good to bad, and from bad to worſe! And we ſhall have additional cauſe to wonder, when in the courſe of this enquiry it appears, that the indulging to the creditor the choice of the meſſenger and appretiators, has, with reſpect to execution againſt land, produced effects ſtill more pernicious than that under conſideration.

Our kings, it is probable, borrowed from England the privilege of entering upon the debtor's land, for payment of debt. That they had this privilege appears from 2d Statutes Robert I. cap. 9. which is copied almoſt word for word from the 8th chapter of the *Magna Charta*. Cautioners had the ſame privilege *, which was extended, as in England, to merchants †. This execution did not entitle the creditor to have the land ſold for payment of the debt, but only to take poſſeſſion of the land, and to maintain his poſſeſſion till the debt was paid, preciſely as in England. But as it has been the genius of our law in all ages to favour creditors, a form of execution againſt land for payment of debt, more effectual than that now mentioned or to this day is known in England, was early introduced into this part of the iſland, which is to ſell land for payment of the debt, in the ſame manner that moveables were ſold. The brieve of diſtreſs, failing moveables, is extended to the debtor's land, which is appointed

* Ibid. cap. 10. † Ibid. cap. 19.

ed to be ſold by the ſheriff fo payment of the debt *. Nor was this execution reſtricted to the half as in England; for our forefathers were more regardful of the creditor than of the ſuperior. And though this originally might be a ſtretch, it happens luckily to be perfectly well accommodated to the preſent condition of land-property, which is not more limited than the property of moveables.

A defect will be obſerved in Alexander's ſtatute, that no proviſion is made where a purchaſer is not found; the leſs excuſeable that the legiſlature had before their eyes a perfect model, in the form preſcribed for attachment of moveables.

There are words in this ſtatute to occaſion a doubt, whether attachment of land for payment of debt, was not an earlier practice in our law. The words are: "The debtor not ſelling his "lands within fifteen days, the ſheriff and the "King's ſervants ſhall ſell the lands and poſ-"ſeſſions pertaining to the debtor, *conform to* "*the conſuetude of the realm*, until the creditor "be ſatisfied of the principal ſum, with da-"mage, expence, and intereſt." But theſe words, *conform to the conſuetude of the realm*, ſeem to refer to the form of ſelling moveables. For I ſee not what regulation was introduced by the ſtatute, if it was not the ſelling land for payment

* Stat. Alex. II. cap. 24.

payment of debt. And conſidering the circumſtances of theſe times, when the Feudal law was ſtill in vigour and the commerce of land but in its infancy, we cannot rationally aſſign an earlier date to this practice.

In England, the ſtatute of merchants was neceſſary to creditors, who at that period had not acceſs to the land of their debtors. But as in Scotland every creditor had acceſs to the land of his debtor, it will be expected that ſome account ſhould be given, why the ſtatute of merchants was introduced here. What occurs is, that the chief view of the Scotch ſtatute of merchants was to give acceſs to the debtor's perſon, which formerly could not be attached for payment of debt. And when ſuch a novelty was introduced, as that of giving execution againſt the perſon of the debtor, againſt his moveables, and againſt his land, all at the ſame time, it was probably thought ſufficient, to give ſecurity upon the land for payment of the debt, without proceeding to a ſale.

It appears from our records, that ſometimes land was ſold for payment of debt by authority of the above-mentioned ſtatute of Alexander II. and ſometimes that ſecurity only was granted upon the land by authority of the ſtatute of merchants. Of the latter, one inſtance occurs upon record, in a ſeiſin dated 29th January 1450; and many ſuch inſtances are upon record

cord down to the time that general appriſings crept into practice.

It is obſerved above, that the ſtatute of Alexander II. is defective, in not providing a remedy where a purchaſer is not found. But this defect was ſupplied by our judges; and land, failing a purchaſer, was adjudged to the creditor by a reaſonable extent; which was done by analogy of the execution againſt moveables. Of this there is one inſtance in a charter dated 22d July 1450, a copy of which is annexed *. And thus we find, that what is properly called a decreet of appriſing, was introduced into practice before the ſtatute 1469, though that ſtatute is by all our authors aſſigned as the origin of appriſings. But it appears from the ſtatute itſelf, compared with former practice, that nothing elſe was in view, but to limit the effect of the brieve of diſtreſs with reſpect to tenants, that there ſhould not be execution againſt their goods for the landlord's debt, but to the extent of a term's rent. And becauſe it was reckoned a hardſhip on a debtor to have his land taken from him, when there were moveable goods upon the land; therefore a ſweetening privilege is beſtowed on him, of redeeming the land within ſeven years. This regulation had an unhappy conſequence, probably not foreſeen: it rendered ineffectual the moſt uſeful branch

* App. No. 7.

branch of the execution, viz. the ſelling land for payment of the debt; for no perſon will chuſe to purchaſe land under reverſion, while there is any proſpect of coming at land without an embargo. This ſtatute, therefore, inſtead of giving a beginning to appriſings of land, did in reality reduce them to a form leſs perfect than they had originally.

One ſalutary regulation was introduced by this ſtatute. By the former practice, no bounds being ſet to the time of completing the execution, it was left to the diſcretion of the ſheriff, to delay as long as he pleaſed for a purchaſer. To ſupply this defect, it was enacted, "That "if a purchaſer be not found in ſix months, "the ſheriff muſt proceed to appriſe land, and "to adjudge it to the creditor."

In no particular are the different manners of the two nations more conſpicuous, than in their laws. The Engliſh have from the beginning preſerved their forms entire, with little or no variation. The Scots have been always attempting or indulging innovations. By this propenſity for improvements, many articles of our law are brought to a reaſonable degree of perfection. But at the ſame time, we are too apt to indulge relaxation of diſcipline, which has bred a profuſion of ſlovenly practice in law matters. The following hiſtory will juſtify the latter part of this reflection.

During

During a vacancy in the office of ſheriff, or when the ſheriff was otherwiſe employed, it appears to have been early the practice of the King's courts, to name a ſubſtitute for executing any particular affair; and this ſubſtitute was called *the ſheriff in that part.* Within thirty years of the ſtatute 1469, there are examples of letters of appriſing, directed to meſſengers at arms, as *ſheriffs in that part.* Theſe letters, we may believe, were at firſt not permitted without a ſufficient cauſe; but ſlighter and ſlighter cauſes being ſuſtained, heritable ſheriffs took the alarm, and obtained an act of parliament *, "diſcharging commiſſions to be gi-"ven in time coming for ſerving of brieves, "or appriſing of lands, but to the judge-ordi-"nary, unleſs *cauſa cognita* upon calling the "judge-ordinary to object againſt the cauſe of "granting." But this ſtatute did not put an end to the abuſe. The practice was revived of naming meſſengers at arms as ſheriffs in that part, for executing letters of appriſing; and at length it became an eſtabliſhed cuſtom, to direct all letters of appriſing to theſe officers.

Appriſing of land, being an execution by the ſheriff, behoved of conſequence to be within the county. But the ſubſtitution of meſſengers who are not connected with any particular county, paved the way to the infringement of

a

* Act 82. parl. 1540.

a regulation derived from the very nature of the execution. The firſt inſtance on record, of permitting the court of appriſing to be held at Edinburgh, is in the year 1582. The reaſon given for a ſtep ſo irregular was, that the debtor's lands lay in two ſhires. And as Edinburgh by this time had become the capital of the kingdom, where the King's courts moſt commonly were held, and where every landed gentleman was ſuppoſed to have a procurator to anſwer for him; it was reckoned no wide ſtretch, to hold courts of appriſing at Edinburgh for the whole kingdom. From this period downward, inſtances of holding courts of appriſing at Edinburgh, multiply upon us; and this came to be conſidered as a matter of right, without neceſſity of aſſigning any cauſe for demanding a diſpenſation, or at leaſt without neceſſity of verifying the cauſe aſſigned.

The ſubſtitution of a meſſenger inſtead of the ſheriff, produced another effect, no leſs irregular than that now mentioned, and much more pernicious to debtors. In letters of poinding, as obſerved above, a blank is left for the name of the meſſenger; the ſame is the form of letters of appriſing; and by this means, in both executions equally, the creditor has the choice of the meſſenger, and conſequently of the appretiators. Thus, by obtaining the court of appriſing to be held at Edinburgh, by a judge

choſen

choſen at will, the creditor acquired the abſolute direction of the execution againſt land; and, preciſely as in the execution againſt moveables, became in effect both judge and party. It will not be ſurpriſing, that the groſſeſt legal iniquity was the reſult of ſuch ſlovenly practice. Creditors taking the advantage of the indulgence given them, exerted their power with ſo little reſerve, as to graſp at the debtor's whole land-eſtate, without the leaſt regard to the extent of the debt. In ſhort, without uſing ſo much as the formality of an appretiation, it became cuſtomary to adjudge to the creditor every ſubject belonging to the debtor that could be carried by this execution; for which the expence of bringing witneſſes to Edinburgh from diſtant ſhires to value land, and the difficulty of determining the value of real burdens affecting land, were at firſt the pretext.

As there is no record of appriſings before the year 1636, we are not certain of the preciſe periods of theſe ſeveral innovations. The only knowledge we have of appriſings before that time, is from the King's charters paſſing upon appriſings; which is a very lame record, conſidering how many appriſings muſt have been led, that were not completed by charter and ſeiſin. But imperfect as this record may be, we find ſeveral charters in the 1607, 1608, 1613,

1613, 1614, &c. paſſing upon general appri- ſings.

It cannot but appear ſtrange, that ſuch groſs relaxation of eſſential forms, and ſuch robbery under colour of law, were not checked in the bud by the ſovereign court. Yet we find nothing of this kind attempted, though the remedy was at hand. There was no occaſion for any new regulation; it would have been ſufficient to reſtore the brieve of diſtreſs to its original principles. All exceſſes, however, promote naturally their own cure; which is the moſt peculiarly remarkable in avarice. General appriſings by their frequency became a public nuiſance, paſt all enduring. The matter was brought under conſideration of parliament, and a ſtatute was made, by far too mild. For inſtead of cutting down general appriſings root and branch, as illegal and oppreſſive, the exorbitant profits were only pruned off; and it was enacted *, "That the rents intromitted with "by the creditor, if more than ſufficient to pay "his annualrent, ſhall be applied towards ex- "tinction of the principal ſum."

It muſt not eſcape obſervation, that by this new regulation, an appriſing is in effect moulded into a new form, much leſs perfect than it was originally: from being a judicial ſale, it is reduced to a judicial ſecurity, or a *pignus prætorium*,

* Act 6. parl. 1621.

tarium, approaching much nearer than formerly to the Engliſh *Elegit*.

An attempt was made by act 19. parl. 1672, to reſtore ſpecial adjudications, but unſucceſsfully. It might have been foreſeen, without much penetration, that no debtor will voluntarily give off land ſufficient to pay the debt claimed, and a fifth part more, reſerving a power of redemption for five years only, when his refuſal ſubjects him to no harder alternative, than to have his whole lands impledged for ſecurity of the neat ſum due, with power of redemption for ten years. It had been an attempt more worthy of the legiſlature, to reſtore the brieve of diſtreſs, by appointing land to be ſold upon application of any ſingle creditor, and to apply the price for his payment. But nothing of this kind was thought of, till the year 1681, when a ſtatute was made, authoriſing a ſale of the debtor's whole eſtate, in caſe of inſolvency. This regulation, which was brought to greater perfection by later ſtatutes, is after all an imperfect remedy; becauſe it only takes place where the debtor is inſolvent. And hence it is, that by the preſent law of Scotland, there is no effectual means for obtaining payment out of the debtor's land eſtate, while he continues ſolvent. Being familiariſed with this regulation, it doth not diſguſt us; but it probably will ſurpriſe a ſtranger, to find a country, where

the debtor's inſolvency affords the only effectual means his creditors have to obtain payment by force of law.

Upon the whole, it is a curious morſel of hiſtory that lies before us. In the firſt ſtages of our law, we had a form of execution for drawing payment of debt, perfect in its kind, or ſo nigh perfection, as ſcarce to be ſuſceptible of any improvement. It has been the operation of ages, to alter, change, innovate, and relax from this form, till it became grievous and intolerable. New moulded by various regulations, it makes at preſent a better figure. But with all the improvements of later times, the beſt that can be ſaid of it is, that, though far diſtant, it approacheth nearer to its original perfection, than at any time for a century or two paſt. And for the public good, nothing remains but to revive the brieve of diſtreſs in its original ſtate, with reſpect to moveables as well as land; admitting only ſome alterations that are made neceſſary by change of circumſtances; ſuch as the preſent independency of tenants, and their privilege to hold property diſtinct from their landlords.

TRACT

TRACT XI.

PERSONAL EXECUTION for payment of Debt.

THE ſubjects that lie open to execution for payment of debt, are, 1ſt, The debtor's moveables. 2dly, His land. And, 3dly, His perſon. The two firſt mentioned being diſcuſſed in the tract immediately foregoing, we proceed to the third. Perſonal execution for payment of debt, was introduced after execution againſt land, and long after execution againſt moveables. Nor will this appear ſingular, when we conſider, that the debtor's perſon cannot, like his land or moveables, be converted into money for the payment of debt. And with regard to a vaſſal in particular, his perſon cannot regularly be withdrawn from the ſervice he owes his ſuperior. This would not have been tolerated while the Feudal law was in vigour; and came to be indulged in the decline of that law, when land was improved, and perſonal ſervices were leſs valued than pecuniary caſualties (1). The firſt ſtatute in this

(1) Among the ancient Egyptians, payment was taken out of the debtor's goods; but the body of the debtor

iſland introducing perſonal execution, is 11th Edward I. which, as appears from the preamble, was to ſecure merchants and encourage trade. It is directed againſt the inhabitants of royal boroughs, and "ſubjects, in the firſt "place, their moveables and burgage-lands to "be ſold for payment of the debt due to the "merchant. And failing goods, the body of "the debtor is to be taken and kept in priſon "till he agree with his creditor. And if he "have not wherewith to ſuſtain himſelf in pri-"ſon, the creditor ſhall find him in bread and "water." An additional ſecurity is introduced by 13th Edward I. "If the debtor do not "pay the debt at the day, the magiſtrates, u-"pon application of the creditors, are obliged "to commit him to the town-priſon, there to "remain upon his own expence until payment. "If the debtor be not found within the town, "a writ is directed to the ſheriff of the ſhire "where

or could not be attached. An individual, on account of a private debt, could not be withdrawn from the ſervice he owed to the public, whether in peace or war. Our author Diodorus Siculus mentions, that Solon eſtabliſhed this law in Athens, freeing all the citizens from impriſonment for debt. — *Book* 1. *chap.* 6. —— And he adds, that ſome did juſtly blame many of the Grecian law-makers, who forbade arms, ploughs, and other things neceſſary for labour, to be taken as pledges, and yet permitted the perſons who uſed theſe inſtruments to be impriſoned.

" where he is, to impriſon him. After a quar-
" ter of a year from the time of his impriſon-
" ment, his goods and lands ſhall be delivered
" to the merchant by a reaſonable extent, to
" hold them till the debt is levied, and his bo-
" dy ſhall remain in priſon, and the merchant
" ſhall find him bread and water." This lat-
ter ſtatute was adopted by us * ; and our ſta-
tute, I preſume, is the foundation of the act of warding peculiar to royal boroughs. A copy of this writ is in the appendix, N°. 8.

As this was found a ſucceſsful expedient for obtaining payment of debt, it was afterward extended to all creditors †. And thus in England, the creditor may begin with attaching the perſon of his debtor, by a writ named *Capias ad ſatisfaciendum*, the ſame with an act of warding in Scotland againſt inhabitants of royal boroughs. But as this act of Edward III. was not adopted by our legiſlature, there is to this day with us no authority for a *Capias ad ſatisfaciendum*, except in the ſingle caſe of an act of warding.

It is a celebrated queſtion in the Roman law, touching obligations, *ad facta præſtanda*, Whether the debtor be bound ſpecifically to perform, or whether he be liable *pro intereſſe* only. It is at leaſt the more plauſible opinion, that a

* 2d Stat. Robert I. cap. 19.

† 25th Edward III. cap. 17.

man is bound according to his engagement; and after all, why indulge to the debtor an option to pay a ſum, inſtead of performing that work to which he bound himſelf without an option? The perſon accordingly who becomes bound *ad factum præſtandum*, is not with us indulged in an alternative. A refuſal, when he is able to perform, is underſtood an act of contumacy and diſobedience to the law. This is a ſolid foundation for the letters of four forms, which formerly were iſſued upon obligations *ad facta præſtanda*. And the tenor of theſe letters is abundantly moderate; for it is worthy to be remarked, that there is not in them a ſingle injunction but what is in the obligor's power to perform. The ultimate injunction is, "To "perform his obligation, or to ſurrender his "perſon to ward, under the penalty, that o-"therwiſe he ſhall be denounced rebel." If the obligor ſurrendered his perſon to priſon, the will of the letters was fulfilled, and no further execution did proceed. If he was contumacious by refuſing both alternatives, his diſobedience to the law was juſtly held an act of rebellion, to ſubject him to be denounced or declared rebel *. This execution was rather too mild; for the man who refuſeth to perform his engagement when it is in his power, may in

* See in the Appendix, No. 9. a copy of Letters of four forms.

in great juſtice be declared a rebel, without admitting any alternative, ſuch as delivering his perſon to ward.

Obligations for payment of money, were viewed in a different light. If a man failed to pay his debt, the failure was preſumed to proceed from inability, not obſtinacy. Therefore, unleſs ſome criminal circumſtance was ſpecified, the debtor was not ſubjected to any ſort of puniſhment. His land and moveables lay open to be attached by poinding, appriſing, and arreſtment, which were in this caſe the only remedies provided to the creditor. The Engliſh have adopted very different maxims. Impriſonment upon failure of payment, whether conſidered as a puniſhment or a compulſion, cannot be juſtified but upon the ſuppoſition of contumacy and unwillingneſs to pay: on the ſuppoſition of inability without any fault on the debtor's part, it is not only unjuſt to puniſh him with loſs of liberty, but an abſurd regulation, tending to no good end. Therefore the *Capias ad ſatisfaciendum* in England, muſt be founded upon the preſumption of unwillingneſs to pay. This appeared to us a harſh preſumption, as it is frequently wide of the real fact; and therefore we forebore to adopt the Engliſh ſtatute. But experience taught our legiſlature, that failure of payment proceeds from obſtinacy or idleneſs, as often as from inability; nay, debt-

ors were often found ſecreting their effects, in order to diſappoint their creditors; and there was encouragement to deal in ſuch fraudulent practices, when debtors were in all events ſecure againſt perſonal execution. Theſe conſiderations produced the act of ſederunt 1582. It is ſet forth in the preamble, "That the defect "of perſonal execution upon liquid grounds of "debt was heavily complained of; becauſe, after great charge and tedious delay in obtaining decreet, the creditors were often diſappointed of their payment, by ſimulate and "fraudulent alienations made by the debtors, "of their lands and goods, whereby execution "upon ſuch decreets was altogether fruſtrated:"—therefore appointed, "That letters "of horning, as well as of poinding, ſhall be "directed upon decreets for liquid ſums, in "the ſame manner as formerly given upon decreets *ad facta præſtanda.*" And this act of ſederunt is ratified by the act 139. parl. 1584.

There is not in the law of any country a more pregnant inſtance of harſhneſs, I may ſay of brutality, than in our preſent form of perſonal execution for payment of debt; where the debtor, without ceremony, is declared a rebel, merely upon failure of payment. To puniſh a man as a rebel, who, by misfortune or be it bad œconomy, is rendered inſolvent, betokens ſavage and barbarous manners. One would imagine

imagine love of riches to be the ruling paſſion, in a country where poverty is an object of puniſhment. It is true, the cruelty of this execution is ſoftened in practice, as it could not poſſibly ſtand in vigour againſt every principle of humanity. It is a ſubject, however, of curioſity, to enquire how this rigorous execution crept in. The act 1584, juſt now mentioned, gives no countenance to it; for the letters of four forms to be iſſued by that ſtatute upon decrees for payment of debt, are far from being ſo rigorous as our hornings are at preſent. Theſe letters, as above explained, impoſe no other hardſhip upon the debtor, than to oblige him to ſurrender his perſon in ward if he doth not pay. This indeed is a ſtretch, but a moderate one, which the uncertainty whether failure of payment proceeds from unwillingneſs or inability, may juſtify. But upon ſuch an uncertainty, to declare a debtor rebel unleſs he pays, is a brutal practice, which can admit of no excuſe. If indeed the debtor, failing to pay, will not go to priſon, for this contempt of authority he may be juſtly declared rebel. The queſtion then is, What it was that produced an alteration ſo rigorous in the form of this execution, that a debtor, inſtead of being denounced rebel on failing to go to priſon, is denounced rebel on failing to make payment, when it is often not in his power to make payment.

In

In handling this curious ſubject, we muſt be ſatisfied to grope our way in the dark paths of antiquity, almoſt without a guide. And the firſt thing we diſcover is, that letters of four forms were not the only warrant for perſonal execution upon *facta præſtanda*. By the act 84. parl. 1572, touching the deſignation of a manſe and glebe to the miniſter, letters of horning are ordered to be directed by the privy-council, to charge the poſſeſſor to remove within ten days, under the pain of rebellion; without any alternative, ſuch as that of ſurrendering his perſon in ward. And indeed ſuch alternative would be abſurd, where a fact is commanded to be done that cannot conveniently admit of delay. Obligations *ad facta præſtanda* ariſing *ex delicto*, were, I preſume, attended with the like ſummary execution. And I have ſeen one inſtance of this, viz. letters of horning, *anno* 1573, againſt a perſon who had been guilty of a ſpuilzie, commanding, that he ſhould be charged to redeliver the ſpuilzied goods within eight days, under the penalty or certification of being denounced rebel. Thus, though no execution was awarded upon civil contracts *ad facta præſtanda* other than letters of four forms; yet, I preſume, that upon ſuch obligations ariſing *ex delicto*, horning, properly ſo called, upon one charge (2) was commonly the execution.

(2) Letters of horning mean a letter from the King, ordering

execution. And as to obligations introduced by ſtatute, the manner of execution is generally directed in the ſtatute itſelf.

I have made another diſcovery, that the alternative of ſurrendering the perſon in ward, was not always the ſtyle of letters of four forms. When letters of four forms proceeded on a delict, as they ſometimes did, I conjecture, that the foregoing alternative was left out. My authority is the act 53. parl. 1572, "ordering "letters to be direct by the Lords of Council "in all the four forms, charging excommuni-"cated perſons to ſatisfy the kirk, under the "pain of rebellion," without any ſuch alternative as ſurrendering the perſon in ward.

Though horning be a generic term, comprehending letters of four forms as well as horning properly ſo called, as is clear from the above-mentioned ſtatute 1584, appointing a decree for a liquid ſum to be made effectual by letters of four forms which there paſs under the general

ordering or commanding the debtor to make payment, under the pain of being proclaimed a rebel. The ſervice of this letter upon the debtor, is named a *Charge of horning*. If the debtor diſobey the charge, he is denounced or proclaimed a rebel; and becauſe of old, a horn ſerved the ſame purpoſe in proclamations that trumpets do at preſent, therefore the ſaid letter has by cuſtom, though improperly, obtained the name of *Letters of horning*, and the ſervice of the letter has obtained the name of a *Charge of horning*.

general name of *horning;* yet, generally ſpeaking, when horning is mentioned in our old ſtatutes, it is underſtood to be horning on one charge, in oppoſition to letters of four forms. And it is a rule without exception, that wherever horning is ordained to proceed upon a ſingle charge, the alternative of ſurrendering the perſon in ward, is underſtood to be excluded. For where the common number of charges is remitted in order to force a ſpeedy performance, it would be abſurd to put it in the power of the perſon charged, to evade performance by going to priſon.

The operations of our law were originally ſlow and tedious. There behoved to be four citations before a man could be effectually brought into court, and there behoved to be four charges before a man could be effectually brought to give obedience to a decree pronounced againſt him. The inconveniency was not much felt in the days of idleneſs; but when induſtry prevailed, and the value of labour was underſtood, the multiplicity of theſe legal ſteps became intolerable. The number of citations were reduced to two, authoriſed by the ſame warrant, and at laſt a ſingle citation was made ſufficient. It is probable, that the charges neceſſary to be given upon decrees, did originally proceed upon four diſtinct letters or warrants; but it being found that one letter or warrant might be a ſufficient authority for the four charges,

charges, the form was changed according to the model of the letters of four forms lateſt in uſe. At the ſame time, where diſpatch was required, as upon obligations *ad facta præſtanda* ariſing *ex delicto*, and upon ſtatutory obligations, one charge inſtead of four was made ſufficient. But theſe different forms of execution were confined to obligations *ad facta præſtanda*. And with relation to all of them, not excepting the moſt rigorous, it muſt be remarked, that they did not exceed rational bounds. The obligor was in no caſe declared a rebel, unleſs where he was guilty of a real contempt of legal authority, by refuſing to do ſome act which he had power to perform.

We proceed to unfold the origin of perſonal execution upon bonded debts, which probably will give light to the preſent enquiry. There is no ground to ſuppoſe, that perſonal execution was known in this iſland before the reign of Edward I. In England it was introduced by two ſtatutes, which were adopted by us. This hath already been mentioned; as alſo that in England, by ſtatute of Edward III. every debtor in a ſum of money is ſubjected to perſonal execution; which was not adopted by us, now though our law gave no authority for perſonal execution except againſt inhabitants of royal boroughs, yet a hint was taken to make this execution more general by conſent. While money was a ſcarce commodity, and while the demand

demand for it was greater than could be readily ſupplied, moneyed men introduced a practice of impoſing upon borrowers hard conditions, which were engroſſed in the inſtrument of debt. One of theſe was, that in caſe of failing to make payment, perſonal as well as real execution ſhould iſſue. And letters of four forms were accordingly iſſued; though it may be a doubt, whether in ſtrict law a private paction be a ſufficient foundation for ſuch execution, which being of the nature of a puniſhment, cannot juſtly be inflicted where there is no crime. But by this time we had begun to reliſh the Engliſh notion, that the failing to make payment proceeds commonly from unwillingneſs, and not from inability; and on that ſuppoſition the execution was materially juſt, though ſcarce founded on law. This practice, however, gained ground without attention to ſtrict principles; and it came to be eſtabliſhed, that conſent is a ſufficient foundation for perſonal execution. See Appendix No. 9. Letters of four forms.

But the rigour of money-lenders did not ſtop here. They were not ſatisfied with letters of four forms, becauſe the dreadful commination of being declared rebel, might in all events be evaded by the debtor's ſurrendering his perſon in ward. Nothing leſs would ſuffice, than to have the moſt rigorous execution at command, ſuch as was in practice upon an obligation *ad*

factum

factum præſtandum ariſing *ex delicto*. And thus in bonds for borrowed money, it became cuſtomary to provide, that, inſtead of letters of four forms, letters of horning ſhould proceed upon a ſingle charge, commanding the debtor to make payment, under the penalty of being declared a rebel without admitting the alternative of going to priſon. At the ſame time, the debtor commonly was charged to make payment within ſo few days, as not even to have ſufficient time for the performance, however willing or ready he might be. The rigour of theſe pactions was in part repreſſed by the act 140. parl. 1592; particularly with reſpect to the time of performance; but perſonal execution upon obligations for debt was left untouched; as was alſo the form of this execution upon a ſingle charge, attended with the penalty of rebellion upon failing to make payment.

In this manner crept in perſonal execution on bonded debts, which in practice was ſo thoroughly eſtabliſhed, as to be iſſued on a bare conſent, "that executorials might proceed in "form as effeirs." One inſtance of this appears in the record, viz. letters of four forms, John Lawſon *contra* Sir John Stewart and his ſon, dated the 7th of May 1582, and recorded 16th Auguſt after. But probably letters of horning, properly ſo called, upon a ſingle charge,

charge, were never iſſued unleſs in purſuance of an explicit conſent.

It may juſtly be preſumed, that the practice of perſonal execution upon bonded debts, paved the way to the above-mentioned act of ſederunt 1582. For after perſonal execution upon decrees of conſent for payment of money was once eſtabliſhed, it was a natural extenſion to give the ſame execution upon decrees for payment of money obtained *in foro contentioſo*.

It only remains to be obſerved, with reſpect to perſonal execution upon decrees *in foro contentioſo*, that it has always been underſtood an extraordinary remedy; and therefore that it requires the ſpecial interpoſition of the ſovereign authority. This authority is obtained by an order directed to the keeper of the King's ſignet, iſſuing from any of his proper courts, ſuch as the ſeſſion, juſticiary, or privy council when it was in being; and the King interpoſes his authority of courſe, for executing the ordinances of his own courts. But as he condeſcends not to execute the ordinances of any other court, therefore no inferior judge or magiſtrate can give warrant for letters of horning; not even the judge of the court of admiralty, nor the commiſſaries of Edinburgh, neither of which properly are the King's courts. The method formerly in uſe for procuring perſonal execution upon the decrees of ſuch courts, was to obtain

obtain from the court of ſeſſion a decree of interpoſition, commonly called a *Decreet conform*; which being a decree of a ſovereign court, was a proper foundation for letters of horning. But this method gave place to one more expeditious, as we ſhall ſee anon.

If this ſketch of the origin of perſonal execution with reſpect to debt be but roughly drawn, let the deficiency of materials plead my excuſe. Luckily there is not the ſame ground of complaint in the following part of the hiſtory, every article of which is clearly vouched. The firſt ſtatute abridging letters of four forms upon decrees *in foro contentioſo*, is the act 181. parl. 1593, "authoriſing letters of horning containing a ſingle charge of ten days, to proceed upon decreets of magiſtrates within burgh, without the neceſſity of letters conform." Letters of horning, properly ſo called, upon a ſingle charge, being here introduced in place of letters of four forms, the known tenor of ſuch letters removed all ambiguity, and made it evident, that the legiſlature intended the debtor ſhould be denounced rebel upon failing to make payment, without admitting the alternative of ſurrendering his perſon in ward. Here is a monſter of a ſtatute, repugnant to humanity and common juſtice. But by this time, the alternative of being denounced rebel upon failing to make payment, founded on conſent, was familiar; and if ſuch execution could be founded

on conſent, it was reckoned no wide ſtretch to give the ſame execution upon a decree *in foro contentioſo*. This however is no ſufficient apology for extending a harſh practice, which ought rather to have been totally aboliſhed. But the influence of cuſtom is great; and our legiſlature ſubmitted to its authority without due deliberation; not only in this ſtatute, but afterwards in extending the regulation to the decrees of other inferior courts *. It may juſtly be a matter of ſupriſe, that ſtatutes ſo contradictory to equity and humanity were tamely ſubmitted to. To account for this, I muſt obſerve, that the ſame thing happened here that conſtantly happens with relation to harſh and rigorous laws. Such laws have a natural tendency to diſſolution; and even where they are ſupported by the authority of a ſettled government, means are never wanting to blunt their edge. Thus, though the law was ſubmitted to, which inflicted the penalties of rebellion on preſumed diſobedience, when poſſibly at bottom there was no fault; yet no judge could be ſo devoid of common humanity, as willingly to give ſcope to ſuch penalties. A diſtinction was ſoon recogniſed, betwixt treaſon or rebellion in the proper ſenſe of the word, and the conſtructive rebellion under conſideration, termed *civil rebellion*; and it came to be reckoned oppreſſive and

* Act 10. parl. 1606; act 6. parl. 1607; act 15. parl. 1609; act 7. parl. 1612.

and diſgraceful, to lay hold of any of the penalties attending the latter. In this manner civil rebellion loſt its ſting, firſt in practice, and now with regard to ſingle and liferent eſcheat, by a Britiſh ſtatute *. For though the law was ſcarce ever put in execution to make theſe penalties effectual, yet as upon ſome occaſions they were uſed as a handle for oppreſſion, it was thought proper to aboliſh them altogether.

In the mean time, letters of four forms continued to be the only warrant for perſonal execution, upon decrees of the court of ſeſſion. But this court, eſteeming it a ſort of impeachment upon their dignity to be worſe appointed than inferior courts are with reſpect to perſonal execution, took upon them † to aboliſh letters of four forms, and to appoint the ſame letters of horning to paſs on their own decrees, that by ſtatute were authoriſed to paſs upon decrees of inferior courts. That decrees of the ſupreme court ſhould at leaſt be equally privileged with thoſe of inferior courts, is a propoſition that admits not a doubt. I cannot, however, without indignation, reflect on the preamble of the act of ſederunt, aſſerting, that letters of horning properly ſo called are a form of execution leſs burdenſome upon debtors than letters of four forms; which is a bold attempt to impoſe on the common ſenſe of mankind.

* 20th Geo. II. 50. † Act of ſederunt 1613.

To complete this ſhort hiſtory, there only remains to be added, that to obtain a warrant for perſonal execution, it is ſcarce ever neceſſary, as our law now ſtands, to apply to the court of ſeſſion for a decree of interpoſition. By the regulations 1563, concerning the commiſſary-court, a more curt method was introduced for obtaining letters of horning upon the precepts of the commiſſaries of Edinburgh; which is, that the court of ſeſſion, upon an application to them by petition, ſhould inſtantly iſſue a warrant for letters of horning. And the ſame method was preſcribed, in all the ſtatutes above mentioned that authoriſed letters of horning upon decrees of inferior courts.

When we compare our form of perſonal execution with that of England, we perceive a wide difference. In England, the *Capias ad ſatisfaciendum* is a writ directed to the ſheriff, to impriſon the perſon of the debtor till he give ſatisfaction to his creditor; of which the conſequence is, that payment made by the debtor entitles him of courſe to his liberty. But in Scotland, an act of warding excepted, a debtor is not committed to priſon upon account merely of his failing to make payment. He muſt be denounced rebel before a *Capias* or caption can be iſſued. Nor is this a *Capias ad ſatisfaciendum;* it is built upon a different foundation. Impriſonment is one of the penalties of rebel-

lion

lion; and our *Capias* is iſſued againſt the perſon, not as debtor but as rebel. The debtor accordingly, by the words of our caption, muſt remain in priſon, "till he be relaxed from the "proceſs of horning;" that is, obtain the King's pardon for his rebellion. For this reaſon it is, that tendering the ſum due, is not in ſtrict law ſufficient to ſave the debtor from priſon. Nor after impriſonment will he be entitled to his freedom upon tendering the ſum, till he alſo obtain letters of relaxation. The court of ſeſſion indeed diſpenſed with this formality in ſmall debts, "declaring the creditor's con-"ſent ſufficient for the debtor's liberation, "when the ſum exceeds not 200 merks *."

* Act of ſederunt, 5th February 1675.

TRACT XII.

EXECUTION for obtaining payment after the DEATH of the Debtor.

IN handling this ſubject, I cannot hope fully to gratify the reader's curioſity otherwiſe than by tracing the hiſtory of this branch of law from remote ages. It will be neceſſary not only to gather what light we can from the rules of common juſtice, but alſo to examine the laws of England and of old Rome, which have been copied by us in different periods.

The great utility of money as a commercial ſtandard, made it from the time of its introduction a deſirable object. It came itſelf to be one of the principal ſubjects of commerce, and of contracts of loan. When money is lent, it is the duty of the debtor to pay the ſum at the term covenanted; and to procure money by a ſale of his goods, if he cannot otherwiſe ſatisfy his creditor. If the debtor be refractory or negligent, it is the duty of the judge to interpoſe, and to direct a ſale of the goods, in order that the creditor may draw his payment out of the price.

In what manner debts are to be made effectual after the debtor's death, by the rules of common juſtice, is a ſpeculation more involved. One thing is obvious, that if no perſon claim the property of the goods as heir, or by other legal title, the creditors ought to have the ſame remedy that they had during their debtor's life. In this caſe, there is required no ſtretch of authority. On the contrary, when a debtor's goods after his death are ſold for payment of his debts, the law is no further exerted than to ſupply the defect of will, which, it is preſumed, the debtor would have interpoſed had he been alive; whereas when a debtor's goods, during his life, are ſold by public authority, his property is wreſted from him againſt his will.

But now an heir appears, and the property is transferred to him by right of ſucceſſion. Juſtice will not allow him to enjoy the heritage of his anceſtor, without acknowledging his anceſtor's debts. Therefore, if he ſubmit not to pay the whole debts, one of two things muſt neceſſarily follow, either that he account to the creditors for the value of the heritage, or that he conſent to a ſale for their behoof. Juſtice, as appears to me, cannot be fulfilled but by purſuing the latter method; and my reaſons for thinking ſo are two. The firſt is, that creditors have an equitable claim to the effects of their deceaſed debtor, but none againſt his iſſue or

other relations; and therefore that theſe effects ought to be ſurrendered to the creditors for their payment, unleſs the heir, by making full payment, put an end to their claim. The next is, that ſale, the beſt method for determining the value of a commercial ſubject, ought to be preferred by judges before the uncertain opinion of witneſſes. The *prætium affectionis* of the heir ought not to weigh againſt the more ſolid intereſt of creditors, who are *certantes de damno evitando;* not to mention, that an heir, if he have an affection for the ſubject, may gratify his affection by offering the ſmalleſt ſum above what another eſteems the intrinſic value.

The Romans, with reſpect to heirs, had a peculiar way of thinking, which muſt be explained becauſe it relates to the ſubject under conſideration. An heir, in the common ſenſe of mankind, is that perſon who, by blood or by will, is entitled to the effects of a perſon deceaſed; and the ſucceſſion of an heir, is a mode eſtabliſhed by law, for veſting in a living perſon effects which belonged to another at his death. Hence it is, that with reſpect to different ſubjects, the ſame perſon may have different heirs; as for example, an heir of blood may ſucceed to ſome ſubjects, and an heir by will to others. The idea of an heir in the Roman law, is not derived from the right of ſucceeding to the heritage in general or to any particular ſubject, but

but reſts upon a very different foundation. The Roman people were diſtinguiſhed into tribes or *gentes*. A tribe was compoſed of different *familiæ*, and a *familia* of different *ſtirpes*; and while the republic ſtood, it was one great branch of their police, to preſerve names and families diſtinct from each other. To perpetuate old families, the privilege of adoption was beſtowed on thoſe who had not children. The perſon adopted, who aſſumed the name of the family, came in place of a natural ſon, and had all the privileges that by law belong to a natural ſon. This branch of the Roman police produced a ſingular conception of an heir, viz. the bearing the name of the family, and adding a link to the family-chain. The ſucceſſion of an heir among the Romans had no relation to property, was not conſidered as a right of ſucceeding to ſubjects, but as a right of ſucceeding to the perſon deceaſed, of coming in his place, of repreſenting him, and of being as termed in the Roman law, *eadem perſona cum defuncto*. In a word, an heir in the Roman law is he who repreſents the deceaſed perſonally; and the repreſenting the deceaſed with reſpect to ſubjects of property, doth not leſs or more enter into the Roman definition of an heir. Nor was it at all neceſſary that this circumſtance ſhould enter the definition: it was ſufficient that every benefit of ſucceſſion was the unavoidable conſequence

of

of perſonal repreſentation; which obviouſly is the caſe; for if an heir is *eadem perſona cum defuncto*, ſucceſſion in the eye of law makes no change of perſon, and conſequently no change of property. Hence the maxim in the Roman law, that *Nemo poteſt mori pro parte teſtatus et pro parte inteſtatus*; if an heir was adopted or named, his perſonal repreſentation of the teſtator entitled him of courſe to every ſubject and every privilege that belonged to the teſtator.

This ſingular notion of an heir among the Romans, gave creditors a benefit that they have not by common juſtice. The death of their debtor, if he was repreſented by an heir, made no alteration in their affairs. A debtor who had a repreſentative, died not in a legal ſenſe; his exiſtence was continued in his heir, without change of perſon. The heir accordingly was ſubjected to all the debts, whether he had or had not any benefit by the ſucceſſion; and if the heir proved dilatory or refractory, his whole effects might be ſold for payment, as well what belonged properly to himſelf, as what he acquired by ſucceſſion. This undoubtedly was a ſtretch beyond the rules of common juſtice; for creditors ought not to gain by the death of their debtor, and an heir ought not to ſuffer by his ſucceſſion. But to palliate this injuſtice, an heir had a year to deliberate whether he ſhould accept of the ſucceſſion; if he made it his choice

choice to accept and to run all hazards, which ſometimes produced loſs inſtead of gain, that loſs, reſulting from his own choice, was reckoned no ſuch hardſhip as to deſerve a remedy. But this notion of an heir, beneficial to the creditors in one reſpect, was hurtful to them in another: for where the heir's proper debts exceeded his own funds, his creditors had acceſs to the funds of the anceſtor, which were now become their debtor's property by ſucceſſion. Here was real injuſtice done to the anceſtor's creditors; which in courſe of time was remedied by the Prætor. He decreed a *ſeparatio bonorum*, and authoriſed the anceſtor's funds to be ſold for payment of his debts *.

The groſs injuſtice of ſubjecting an heir to the debts of the anceſtor without limitation, produced in time another remedy, viz. the benefit of inventory, by which, upon making an exact liſt of the anceſtor's effects, an exception in equity was given to the heir, to protect him from being liable perſonally to more than the value of the goods contained in the liſt. Whether this value was to be aſcertained by the opinion of witneſſes, or whether the heir was bound to ſell the goods for payment of the anceſtor's debts, is not clear. But the latter ſeems to have been the rule, as may be gathered, not only from the reaſon of the thing, but from

* l. 1. § 1. De ſeparationibus.

from the conſtitution of Juſtinian introducing the benefit of inventory *. And in our practice, though an heir who has the benefit of inventory, is not liable perſonally beyond the value of the goods in the inventory, to be aſcertained by a proof, yet if the creditors chuſe to take themſelves to the goods for their payment, it is in their power to bring the ſame to ſale, and to lay hold of the price for their payment.

But however far the Roman law ſtrayed from juſtice where the debtor's heritage was claimed by an heir, the ſame complaint does not lie in the caſe of inſolvency, where the heir abandoned the ſucceſſion; for the debtor's goods were in this caſe ſold for payment of his debts, in the ſame manner as when he was alive. It is true, that among the Romans, remarkable originally for virtue and temperance, it was ignominious for a citizen to have his effects ſold by public authority. To prevent ſuch diſgrace, it was common to inſtitute a ſlave as heir, who, after the teſtator's death, being obliged to enter, the hereditary ſubjects were ſold as his property, and the real debtor's name was not mentioned †.

We proceed to the Engliſh law, which in all probability was anciently the ſame with our own.

* l. 22. § 4. et 8. C. De jure delib.

† Inſtit. De hered. qualit. et diff. § 1.; Heineccius Antiquit. l. 2. tit. 17. 18. 19. § 11.

own. And to underſtand the ſpirit of that law, it muſt be premiſed, that while the Feudal law was in its purity, a vaſſal had no land property; he had only the profits of the land for his wages; and when he died, his ſervice being at an end, there could no longer be a claim for wages. The ſubject returned to the ſuperior, and he drew the whole profits, till the heir appeared; who was entitled by the original covenant, upon performing the ſame ſervice with his anceſtor, to demand poſſeſſion of the land as his wages. If his claim was found juſt, the poſſeſſion was delivered to him by a very ſimple form, viz. an order or precept from the ſuperior to give him poſſeſſion; and this was called *renovatio feudi*. There is nothing to be laid hold of in any branch of this proceſs, for making the heir liable to the anceſtor's debts. By performing the feudal ſervices, every heir is entitled to the full enjoyment of the land in name of wages; and his right being thus limited, he hath no power of diſpoſal, nor of contracting debt to affect the ſubject farther than his own intereſt reaches. The next heir who ſucceeds is not liable to the predeceſſor's debts; becauſe the land is delivered to the next heir, not as the predeceſſor's property, but as the property of the ſuperior; and poſſeſſion is given to the next heir, as wages for the ſervice he hath undertaken to perform. From this ſhort ſketch it muſt

muſt be evident, that, while the Feudal law ſubſiſted in its purity, a vaſſal's debts after his death, however effectual againſt his moveables, could not burthen the land, nor the heir who ſucceeded to the land.

But after land was reſtored to commerce, and a vaſſal was underſtood to be in ſome ſort proprietor ſo as even to have power of alienation; it was a natural conſequence, that the land, as his property, ſhould be ſubjected for payment of his debts, not only during his life, but even after his death. And if a man's moveables can, after his death, be attached for payment of his debts, why not his land; ſuppoſing him equally proprietor of both? Accordingly by the law of England, "Judgments of all kinds, whether "*in foro contentioſo*, or by conſent, may be made "effectual by an *Elegit*, after the debtor's "death, as well as during his life, without ne"ceſſity of taking a new judgment againſt the "heir *." A judgment by the law of England hath ſtill greater force. "Lands are bound "from the time of the judgment, ſo that exe"cution may be of theſe, though the party a"liens *bona fide*, before execution ſued out †." If an *Elegit* can attach land conveyed after the judgment to a *bona fide* purchaſer, it is not ſo great a ſtretch to make it attach land after the debtor's

* New Abridgement of the law, vol. 2. p. 337.

† Ibid. vol. 2. p. 361.

debtor's death, in the hand of the heir, or *in hereditate jacente*, if the heir be not entered.

The ſame method takes place in debts on which there is no judgment againſt the debtor; with this only variation, that the creditor muſt begin with taking a decree againſt the heir, becauſe the authority of a decree is neceſſary for execution. The decree taken againſt the heir in this caſe, reſembles a decreet of cognition with us, to be a foundation for attaching the deceaſed debtor's heritage, but not to have any perſonal effect againſt the heir, nor againſt his proper eſtate *.

Nor is it difficult to diſcover the foundation of this practice. It depends on a principle of juſtice, which is ſimple and obvious, That every man's proper effects ought to be applied for payment of his debts. His death cannot by any rule of juſtice withdraw theſe effects from his creditors; nor can it ſubject the heir, who ought not to be liable for debts not of his own contracting; unleſs he converts to his own uſe the anceſtor's effects.

The rule in England, That an heir is not ſubjected to his anceſtor's debts, but only the anceſtor's own funds, produced another effect, which is, to veſt in the heir the property of the anceſtor's heritable eſtate, even without exerting any act of poſſeſſion. The very ſurvivance of

* New abridgement of the law, vol. 3. p. 25.

of the heir gives him, in the law-language of England, legal ſeiſin; that is, gives him all the advantages of real poſſeſſion; and juſtly, becauſe his *animus poſſidendi* muſt always be preſumed, where the apprehending poſſeſſion is attended with no riſk. This is the ſenſe of the maxim, *Quod mortuus ſaſit vivum*, which obtains in France as well as in England; and of which we now ſee the foundation. This branch of the law of England, is not more beautiful by its ſimplicity, than by its equity and expediency. Nothing can be more ſimple or expedient, than by mere ſurvivance to veſt in the heir the eſtate that belonged to the anceſtor; and nothing can be more equitable than a *ſeparatio bonorum*, by which the funds of the anceſtor are ſet apart for payment of his debts; without vexing the heir, who in common juſtice ought not to be liable but for debts of his own contracting.

We have great reaſon to preſume as to this matter, that our law was once the ſame with that of England, though we have now adopted different maxims, deviating far from natural equity and from the ſimplicity and expediency of the Engliſh law. That our law was the ſame will not be doubted, when in this country of old we find the ſame effect given to judgments, that at preſent is given in England. In the 2d Statutes Robert I. cap. 19. § 12. it is laid down with

with reſpect to debts due to merchants, "That "in execution againſt the lands of the debtor, "ſaſine ſhall be given of all the lands which "belonged to the debtor at the time of enter-"ing into the recogniſance, in whoſe ever "hands they have ſince come, whether by in-"feftment or otherwiſe." This authority, it is true, relates to a decree of conſent; but we are not to ſuppoſe, that ſuch a decree was more privileged than a judgment *in foro contentioſo*; and if ſo, there could be no difficulty of mak-ing a judgment effectual againſt the debtor's land, in the hands of his heir, or *in hereditate jacente*. And we find traces of this very thing in our old law. In the above-mentioned 2d Statutes Robert I. § ult. it is enacted, "That "if a debtor die, the merchant-creditor ſhall "not have his body, but ſhall have execution "againſt his lands, as there above laid down;" that is, by a brieve out of the chancery direct-ed to the ſheriff, to deliver to the creditor all the goods and lands which belonged to the debtor, by a reaſonable extent. The like exe-cution is authoriſed, Leg. Burg. cap. 94. even where the heir is entered. But this is not all; we have poſitive evidence, that ſuch was the practice in Scotland even after the beginning of the ſixteenth century. There is on record a charter of appriſing, *anno* 1508, in favour of Richard Kine, who having been decerned to

pay L. 20, as cautioner for Patrick Wallance, obtained letters after Patrick's death for appriſing his land. Patrick's heirs were edictally cited, and his land was appriſed and adjudged to Richard, for payment to him of the ſaid ſum; and this was done without any previous decree againſt the heir, or charge to enter. A copy of this charter is annexed *; and upon ſearching the records, more of the ſame kind will probably be found. In a matter of ſuch antiquity, theſe authorities ought to convince us, that as to execution againſt a debtor's land-eſtate after his death, our old law was the ſame with the Engliſh law, and the ſame that continues to be the Engliſh law to this day.

And if ſuch was the law of Scotland with reſpect to execution after the debtor's death, upon decrees whether *in foro* or of conſent, it cannot be doubted but that the ſame form of execution did obtain where there was no judgment during the debtor's life; with this variation only, that a decree of cognition was neceſſary before execution could be awarded.

A man who treads the dark paths of antiquity, ought to proceed with circumſpection, and be conſtantly on the watch. We have entertained hitherto little doubt about the right road; but in proſecuting our journey, appearances are not quite ſo favourable. We ſtumble

* Appendix, No. 10.

ble unluckily upon the act 106. parl. 1540, which ſeems to pronounce, that far from proceeding in the right path, we have been wandering this while. The act, it is true, is conceived in terms ſo ambiguous, as to make it doubtful whether it concerns the creditors of the anceſtor or thoſe of the heir. But that it is calculated to benefit the former only, all our authors agree. And we have a ſtill greater authority, viz. the act 27. parl. 1621, which, proceeding upon the narrative that the ſaid ſtatute regards the creditors only of the deceaſed, extends the ſame remedy to creditors of the heir. This in effect is declaring, not only that the creditors of the heir before the 1621, had no execution againſt the anceſtor's land unleſs the heir their debtor was pleaſed to enter; but alſo, that not even the creditors of the anceſtor had before the act 1540, any execution againſt the land, unleſs the heir, who was not their debtor, was pleaſed to enter.

Theſe are weighty authorities in ſupport of the ſenſe univerſally given to the ſtatute 1540. And yet that the common law of Scotland ſhould impower every heir of a land-eſtate, by abſtaining from the ſucceſſion, to forfeit the creditors of his anceſtor, is a propoſition too repugnant to the common principles of juſtice to gain credit. This propoſition will appear ſtill more abſurd, upon bringing the ſuperior

into the queſtion. The land returned to him, if the heir did not ſubmit to be his vaſſal; but a good underſtanding betwixt them, perhaps for a valuable conſideration, might entitle the heir to hold the land in defiance of all the creditors. To accompliſh a ſcheme ſo fraudulent, no more was neceſſary but a private agreement, that the land ſhould return to the ſuperior by eſcheat, and then be reſtored to the heir by a new grant. A contrivance ſo groſsly unjuſt would not have been tolerated in any country. We had appriſings of land as early as the reign of Alexander II. I have demonſtrated above, that it is no ſtretch of legal authority, to iſſue this execution after the debtor's death more than during his life, and that the heir hath no title to prevent this execution whether he be entered or not entered. Let it further be conſidered, that by our oldeſt law the heir was liable even for moveable debts, where the moveables were deficient *. What then was to bar law from taking its natural courſe? It is certain there lay no bar in the way; and the neceſſity of ſuch an execution muſt have been obvious to the meaneſt capacity, in order to fulfil the rules of common juſtice; not to mention its utility for ſupporting credit and extending commerce.

But

* Reg. Maj. l. 2. cap. 39. § 3.

But it is losing time, to argue thus at large about the construction of a statute. The above mentioned charter 1508, makes it clear, that the statute cannot relate to the creditors of the ancestor. By that charter it is vouched, that in the 1508, execution against the debtor's estate proceeded after his death, with as little ceremony as during his life. The practice must have been the same in the 1540; and therefore as the creditors of the deceased had no occasion for a remedy, the remedy provided by the statute must have been intended for the creditors of the heir. To fortify this construction, there is luckily discovered another remarkable fact. Our sovereign court, so far from doubting of the privilege that creditors have to attach the land-estate of their debtor after his death, ventured to authorise an apprising of the predecessor's estate on the debt even of the heir apparent. One instance of this I find in a charter of apprising, 24th May 1547, granted by Queen Mary to the Master of Semple. This charter subsumes, "That the Earl of Lennox, in or-"der to protect his family-estate from being at-"tached for payment of a debt due by him "personally to the Queen, had refused to enter "heir to the said estate: That he had been "charged to enter heir within twenty-one days, "under certification, that the lands should be "apprised as if he were really entered; and

" that he having diſobeyed the charge, the " lands were accordingly appriſed," &c. *. The date of the charge to enter is omitted in the charter; but that it muſt have been before the ſtatute 1540, is evident from the following circumſtances, that the ſtatute is not mentioned in the charter; and that the charge is upon twenty-one days, which ſhows that it proceeded not on the ſtatute; for by the ſtatute the charge muſt be on forty days. We have no reaſon to ſuppoſe this to be a ſingular inſtance; nor is it mentioned in the charter as ſingular. Here then is diſcovered an important link in the hiſtorical chain; to wit, that a charge againſt the heir to enter at the inſtance of his own creditor, was introduced by the ſovereign court, without authority of a ſtatute. And if this hold true, the act 1540, could not be intended for any other effect, but to confirm this former practice, with the ſingle variation, that the charge to enter ſhould be upon forty days in place of twenty-one. This curious fact affords convincing evidence, that before the 1540, the debtor's death did not bar his creditors from acceſs to his eſtate. For it is not conſiſtent with the natural progreſs of improvements, that the common law ſhould be ſtretched in favour of the creditors of the heir-apparent; while the predeceſſor's own creditors, whoſe connection with

* See a copy of this charter, Appendix, No. 11.

with his eſtate is incomparably ſtronger, were left without a remedy. Theſe creditors muſt have been long ſecure, before a remedy would be thought of for remoter creditors, viz. thoſe of the heir-apparent.

But in combating the authority of the ſaid act 1621, we muſt not reſt ſatisfied with ſuch proofs as may be reckoned ſufficient in an ordinary caſe. I add therefore other proofs, that will probably be thought ſtill more direct. In the firſt edition of the Statutes of James V. bearing date 8th February 1541, the title prefixed to the ſtatute under conſideration is in the following words: "The remeid againſt them "that lye out of their lands, and will not en-"ter in defraud of their creditors." This clearly ſhows what was underſtood to be the meaning of the ſtatute at the time it was enacted, viz. that it reſpects the creditors ſolely of the heir-apparent. And the ſame title is alſo prefixed to the next edition, which was in the 1566. The other proof I have to mention, appears to be altogether deciſive. Upon ſearching the records, it is diſcovered, that the firſt charges given by authority of the ſtatute, were at the inſtance of creditors of heirs apparent; one of them as early as the year 1542. This I take to be demonſtrative evidence of the intendment of the ſtatute; for we cannot indulge ſo wild a thought, as that our judges, the very

perſons probably who framed this ſtatute, were ignorant of its meaning.

As the foregoing arguments and proofs ſeem to be invincible, we muſt acknowledge, however unwillingly, that our legiſlature, in making the act 1621, were in one particular ignorant of the law of their own country. They are not however altogether without excuſe. I ſhall have occaſion immediately to ſhow, that long before the year 1621, the old form of execution againſt land after the death of the debtor, ſimple and eaſy as it was, had been abandoned, and another form ſubſtituted, no leſs tedious than intricate; which, conſidered in a ſuperficial view, might lead our legiſlature into an opinion, that the creditors of the heir-apparent were not provided for by the ſtatute 1540. In fact they adopted this erroneous opinion, which moved them to make the act 1621.

No ſort of ſtudy contributes more to the knowledge of law, than to trace it through its different periods and changes. Upon this account, the foregoing enquiry, though long, will not be thought tedious or improper. In reality it is not practicable, with any degree of perſpicuity, to handle the preſent ſubject, without firſt aſcertaining the true purpoſe of the act 1540. For according to the interpretation commonly received, how ridiculous muſt the attempt appear, of tracing from the beginning

the

the form by which debts are made effectual after the death of the debtor, where the heir renounces or avoids entering; while it remains an eſtabliſhed opinion, that creditors were left without a remedy till the ſtatute was made.

Having thus paved the way by removing a great deal of rubbiſh, I proceed to unfold the principles that govern our preſent form of attaching land and other heritable ſubjects, after the death of the debtor.

There is great reaſon to preſume, that our notion of an heir was once the ſame with what is ſuggeſted by the common principles of law, viz. one who by will or by blood is entitled to ſucceed to the heritage of a perſon deceaſed, wholly or partially. Nay, we have the ſame notion at preſent with reſpect to all heirs who ſucceed in particular ſubjects, ſuch as an heir of conqueſt, an heir-male, an heir of entail, an heir of proviſion. Nor is there the leaſt reaſon or occaſion to view even an heir of line in a different light. For what more proper definition of an heir of line, than the perſon who ſucceeds by right of blood to every heritable ſubject belonging to the deceaſed, which is not by will provided to another heir? And yet, with reſpect to the heir of line, we have unluckily adopted the artificial principle of the Roman law, of a perſonal repreſentation, and of identity of perſon; according to the Roman fiction, that

that the heir is *eadem perſona cum defuncto*. The Roman law, illuſtrious for its equitable maxims, deſerves juſtly the greateſt regard. But the bulk of its inſtitutions, however well adapted to the civil polity of Rome and the nature of its government, make a very motely figure when grafted upon the laws of other nations. In this country, ever famous for love of novelty, the prevailing eſteem for the Roman law, has been confined within no rational bounds. Not ſatisfied with following its equitable maxims, we have adopted its peculiarities, even where it deviates from the common principles of juſtice. The very inſtance now under conſideration, without neceſſity of making a collection, is ſufficient to juſtify this reflection. No man can heſitate a moment, to prefer the beautiful ſimplicity and equity of our old law concerning heirs, before the artificial ſyſtem of the Romans, by which an heir cannot demand what of right belongs to him, without hazarding all he is worth in this world. No regulation can be figured more contradictory to equity and expediency; and yet ſuch has been the influence of the Roman law, that as far as poſſible, we have relinquiſhed the former for the latter; that is, with reſpect to general heirs; for as to heirs of conqueſt, heirs of proviſion, and all heirs who ſucceed to particular ſubjects, their condition is ſo oppoſite to that of an heir in the Roman law, that

hat it is impoſſible, by any ſtretch of fancy, to pply the Roman fiction to them.

This unlucky fiction, which ſuppoſes the heir nd anceſtor to be the ſame perſon, hath pro-uced that intricate form preſently in uſe, for btaining payment of debt after the death of he debtor. The creditors originally had no oncern with the heir; their claim lay againſt heir debtor's effects, which they could directly ttach for their payment, whether *in hereditate acente*, or in the hands of the heir. But when he maxim of repreſentation and identity of erſon came to prevail, the whole order of exe-ution was reverſed. By the heir's aſſuming he character of repreſentative, and by becom-ng *eadem perſona cum defuncto*, the anceſtor's ffects are withdrawn from his creditors, and re veſted in the heir as formerly in the an-eſtor. In a ſtrict legal ſenſe, a debtor who as a repreſentative dies not: his exiſtence is ontinued in his heir, and the debtor is not hanged. In this view the heir comes in effect o be the original debtor; and the creditors annot reach the effects otherwiſe than upon is failure of payment, more than if he were n reality, inſtead of fictitiouſly, the original ebtor.

The foregoing caſe of an heir's taking the enefit of ſucceſſion, is ſelected from many that elong to this ſubject, in order to be handled in

in the firſt place; for being the ſimpleſt, it furniſhes an opportunity to examine with the greater perſpicuity, what it was that moved our forefathers, to give up their accuſtomed form of execution for that preſently in uſe. This new form of execution againſt the heir when entered, was probably eſtabliſhed long before the ſixteenth century. We diſcover from our oldeſt law-books, and in particular from the *Regiam Majeſtatem*, that our forefathers began early to reliſh the maxims of the Roman law. And though in this book we diſcover no direct traces of the fiction that makes the heir and the anceſtor to be the ſame perſon; it is probable, however, conſidering the ſwift progreſs of the Roman law in this country, that the fiction obtained a currency with us not long after the *Regiam Majeſtatem*. Hence it is likely, that the old form of appriſing the land for the predeceſſor's debt without regarding the heir, muſt have been long in diſuſe, where the property is by ſervice transferred to the heir; and who thereby is ſubjected perſonally to all the predeceſſor's debts. This caſe undoubtedly gave a commencement to the form preſently in uſe; which requires, that the eſtate be attached, not as belonging to the anceſtor the original debtor, but as belonging to the heir. In this view, a decree goes againſt the heir, making him liable for the debt; upon which follows an adjudication

dication againſt the eſtate, as his property, for payment of his debt. But though the new form commenced ſo early, we have reaſon to believe it was not ſo early completed. Where an heir lies out unentered and intermeddles not with the anceſtor's effects, he cannot be held as *eadem perſona cum defuncto*; and an eſtate to which the heir lays no claim, is naturally conſidered as ſtill belonging to the anceſtor. For theſe reaſons, there was in this caſe nothing to obſtruct the anceſtor's creditors from attaching the eſtate by legal execution, more than if their debtor were ſtill alive. Accordingly, from the charter of appriſing above mentioned granted to Richard Kine, we find, that where the heir did not enter, the old form of attaching land was in uſe as late as the 1508. Nor have we reaſon to ſuppoſe that this was the lateſt inſtance of the kind; for where the creditors of the anceſtor are willing to confine their views to his eſtate without attacking the heir, there cannot be a more ready method for anſwering their purpoſe than that of appriſing the land, which might be done with as little ceremony as when the debtor was alive. A decree it is true was neceſſary for this execution, as no execution can proceed without the authority of a judge; but it was a matter of no difficulty to obtain a decree, if not already obtained againſt the debtor himſelf. The form is, to call the heir

heir in a proceſs, not concluding againſt him perſonally, but only that the debt is true and juſt. The heir has no concern here but merely to repreſent a defendant, and therefore a decree goes of courſe, declaring the debt to be juſt. This declaratory decree, commonly called a *decreet of cognition*, was held, and to this day is held, a ſufficient foundation for execution.

Conſidering that in the beginning of the ſixteenth century, creditors after their debtor's death had acceſs to attach his land in the manner now mentioned, and conſidering that a general charge was in practice before this time, as will by and by be proved; it appears to me evident, that this writ was invented for no other purpoſe but to reach the heir, and to ſubject him perſonally to the debts of his anceſtor; which may be gathered even from the writ itſelf. The heir was ſubjected if he entered, and this was a contrivance to reach him, if poſſible, where he was not entered. This writ, as will be ſhown by and by, produced the preſent form of execution for obtaining payment after the debtor's death, and thereby occaſioned a conſiderable revolution in our law, which makes it of importance to trace its hiſtory with all poſſible accuracy.

To have a juſt notion of letters of general charge, we muſt view an heir apparent with re-

latio

lation to the ſuperior. The heir-apparent has a year to deliberate whether he ſhould enter to the land, and ſubject himſelf to all the duties incumbent on the vaſſal. And he may alſo continue to deliberate after the year runs out, until he be compelled in the following manner to declare his will. The ſuperior obtains a letter from the king, giving authority to charge or require the heir to enter within forty days, under the penalty of forfeiting his right to the feudal ſubject. This furniſhed a hint to creditors who wanted to make the heir liable. A ſimilar form was invented, which had the ſanction of the ſovereign court without a ſtatute. A creditor obtains a letter from the king, giving authority to charge or require the heir to enter within forty days; and to certify him, that his diſobedience ſhall ſubject him perſonally to the creditor, in the ſame manner as if he were entered. This letter, commonly called *Letters of general charge*, being ſerved on the heir, obliges him to come to a reſolution. If he obey the charge by entering, he is of courſe ſubjected to all his anceſtor's debts. If he remain in his former ſituation without entering, the charge is a medium upon which he may be decerned perſonally to make payment to the creditor in whoſe favour the letter is given; and therefore to avoid being liable, he has no other method but to renounce the ſucceſſion, which

which is done by a formal writing under his hand, put into the proceſs or into the regiſter.

At what time the general charge was introduced, cannot with accuracy be determined. That it was known long before the ſtatute 1540, appears from a deciſion cited by Balfour, dated *anno* 1551 *, in which it is mentioned as a writ in common and general uſe; not as recent or newly invented. Its antiquity is further aſcertained by an argument, which, though negative, muſt have conſiderable weight. The court of ſeſſion, the ſame that is now in being, was eſtabliſhed *anno* 1532; and though the moſt ancient records of this court are not entire, we have however pretty great certainty of its regulations, ſuch of them at leaſt as are of importance; for theſe, where the records are loſt, may be gathered from our authors, and from other authentic evidence. But as there is not in any author, or in any writing, the ſmalleſt hint that this writ was introduced by the court of ſeſſion; we have reaſon to conclude, that it had a more early date.

The better to underſtand what follows, we muſt take a deliberate view of this new writ. To ſupply defects in the common law, is undoubtedly the province of the ſovereign court, and is one of its moſt valuable prerogatives. But regulations of this ſort ought not only to be

* Tit. Heirs and Succeſſors, chap. 17.

be founded on expediency, but alſo on material juſtice. Unhappily, neither of theſe grounds can be urged, to juſtify letters of general charge. For firſt, this writ was in no view neceſſary; the common law giving ready acceſs to a debtor's effects after his death for payment of his debts, as well as during his life; beyond which a creditor can have no juſt claim. In the next place, this writ, with reſpect to the heir-apparent, is oppreſſive and unjuſt; for while the effects of the debtor lie open to execution, what earthly concern has the creditor with an heir who hath not claimed the ſucceſſion, nor intermeddled with the effects? and why ſhould any attempt be indulged, to ſubject a man to the payment of debt not of his own contracting? This heteroclite writ, procured in all appearance by the undue influence of creditors, hath in its conſequences proved even to them an unhappy contrivance. It evidently produced our preſent form of obtaining payment after the debtor's death; which, as obſerved, being unjuſt as to the heir, has recoiled againſt the creditors, by involving them in an execution, intricate, tedious, and expenſive; oppoſite in every particular to the ſimple and beautiful form eſtabliſhed at common law. I proceed to ſhew in what manner the general charge produced that change.

Upon reflection it will appear, that after the charge is given and the forty days elapsed, the creditor charging has it no longer in his power to attach by real execution the estate as belonging to the ancestor. If the heir obey the charge by entering, he occupies the place of the ancestor: He is in a legal sense the ancestor; and execution proceeds against him and his effects, precisely as if he were really, and not by a fiction, the original debtor. This bars all access to the original form of execution; the ancestor is withdrawn as if he had never been, and the estate cannot now be appriſed as his property. If the heir remain in his former situation, without declaring his mind, he becomes personally liable, precisely as if he had entered. This situation, equally with the former and for the same reason, bars the creditor from having access to the estate by the old form of execution: as soon as the debt is transferred against the heir, he becomes *eadem persona cum defuncto*. With regard to this debt, he is considered to be the original debtor; and as the creditor no longer enjoys the character of the ancestor's creditor, he cannot have access to the estate as belonging to the ancestor; neither can he have access to it as creditor to the heir, who himself hath no right until he enter. If the heir renounce, the estate returns to the superior, who must have the land if he have not a vassal; and by

by this means alſo the creditor is excluded from all acceſs to the land; becauſe it is now no longer the property either of the anceſtor or of the heir. Theſe conſequences of a charge, where the heir enters not, appear to be ſtrong obſtacles againſt the creditor wanting to attach the land. In what manner they were ſurmounted, I proceed to ſhow.

I begin with the caſe where the heir-apparent, after he is charged, remains ſilent, and neither enters nor renounces. The charge, for the reaſon above mentioned, ſubjects him perſonally to the creditor at whoſe inſtance he is charged; and by the ſame means he may be ſubjected to all the creditors. So far good. The creditors upon this medium may proceed to perſonal execution. But as to real execution, the difficulty is great; for, as above obſerved, the debt by the charge being laid upon the heir, there cannot be acceſs to the land otherwiſe than as belonging to him. But then, how can land be adjudged from a debtor who is not veſted in the property? The reader will advert, that he is engaged in a period long before the ſtatute 1540, affording relief to the proper creditors of the heir by means of a ſpecial charge. As the heir is thus ſubjected to his anceſtor's debts, it becomes his duty to enter to the land, in order to give his creditors acceſs to it for their payment. And if he

prove refractory, it becomes the duty of the ſovereign court to perform for him, by ſelling the land, or by adjudging it to the creditors for their payment. The latter was done. But as before attempting an extraordinary remedy, good order requires the debtor's obſtinacy to be aſcertained, a ſecond letter is obtained from the King, giving authority to charge or require the heir, to enter to the land within forty days; and to certify him, that after the lapſe of this term he ſhall be held, with reſpect to the creditors, as actually entered. This method ſolves all difficulties. The creditors proceed to appriſe the land from the heir, now their debtor, in the ſame manner as if he had a complete title to the ſame by a ſolemn entry.

In the caſe of a renunciation, the obſtacle is much greater than in that laſt mentioned. A renunciation to be heir, according to the nature of feudal property, is a total bar to the anceſtor's creditors, which could not have been ſurmounted, and ought not to have been ſurmounted, while the Feudal law was in vigour. In the original feudal ſyſtem an heir hath no claim to the land which his anceſtor poſſeſſed, unleſs he undertake to ſerve the ſuperior in quality of a vaſſal; and therefore if he refuſe to ſubmit to this ſervice, the ſuperior enters to poſſeſs the land, which antecedently was his property. But a renunciation to be heir, though

though obtained at the ſuit of a creditor, being however an expreſs declaration by the heir that he will not ſubmit to be vaſſal, muſt in ſtrict law reſtore the land to the ſuperior, and cut out all the creditors. This, as obſerved, would originally have been thought no hardſhip. But by this time land in a great meaſure was reſtored to commerce: The bulk of it had paſſed from hand to hand for a full price; and ſuch a purchaſe, contrary to the original conſtitution of the Feudal law, transferred the property to the purchaſer, though according to the form of our land-rights he is obliged to aſſume the character of a vaſſal. Therefore, whatever effect a renunciation might have while a vaſſal's right was merely uſufructuary, it was rightly judged, that it ought not to have the ſame effect where the vaſſal is proprietor. Equity pleaded ſtrongly for the creditors, that the ſuperior, *certans de lucro captando*, ought not to be preferred to them, *certantes de damno evitando*. Theſe conſiderations moved the ſovereign court, to think of ſome remedy for relieving the creditors. It would have been too bold an attack on eſtabliſhed law, to declare, that in this caſe a renunciation ſhould not operate in favour of the ſuperior, but only of the creditors. The court took ſofter meaſures. The law was permitted to have its courſe, in reſtoring the land to the ſuperior. But action was ſuſtained to the cre-

ditors againſt the ſuperior, to infeft them in the land for ſecurity and payment of their debts; and the decree given in this proceſs obtained the name of "an adjudication upon a "renunciation to be heir," "or an adjudica-"tion *cognitionis cauſa*;" which being afterwards modelled into a different form, paſſes now commonly under the name of "an adju-"dication *contra hereditatem jacentem* *." Here was invented a new ſort of execution againſt land, ſimilar in its form to no other ſort in practice. And it may be thought ſtrange, why the court, in imitation of the eſtabliſhed form of appriſing, did not rather direct the land to be ſold for payment of the creditors. In matters of great antiquity where hiſtory affords ſcarce any light, it is difficult to give ſatisfaction upon every point. I can form no conjecture more probable, than that in contriving a remedy againſt the hardſhips of the common law, the court thought that it was venturing far enough to afford the creditors a ſecurity upon land, which once indeed belonged to their debtor, but was now legally transferred to the ſuperior with whom they had no connection.

With reſpect to other heritable ſubjects, allodial in their nature as not held of any ſuperior, heirſhip moveables, for example, bonds ſecluding executors, and diſpoſitions of land without

* See Statute Law abridged, note 1.

out infeftment, the heir's renunciation created no difficulty. Subjects of that kind are by the renunciation left *in medio* without an owner; and it is an obvious as well as a natural ſtep, to adjudge them to a creditor for his payment. By ſuch adjudication the court doth nothing but what the debtor himſelf ought to have done when alive; and which it is preſumed he would have done, had he not been prevented by death. This adjudication, it is probable, was the firſt that came into uſe, and paved the way to an adjudication of land, when it returned to the ſuperior by the heir's renunciation.

If the general charge be of an ancient date, we cannot have much difficulty about the æra of the ſpecial charge. For as the general charge is a very imperfect remedy without the ſpecial charge, the invention of the latter could not be at any diſtance of time from the eſtabliſhment of the former. And a fact is mentioned above, which puts this matter beyond conjecture. Before the ſtatute 1540, we find relief by a ſpecial charge afforded even to the proper creditors of the apparent heir; which proves to conviction, that the ſame relief muſt have been afforded long before to the creditors of the anceſtor, after the heir is made liable by a general charge. According to the natural courſe of human improvements, the creditors of the deceaſed proprietor, muſt have been long

privileged with a ſpecial as well as with a general charge, before it would be thought proper to extend the privilege of a ſpecial charge to the creditors of his heir-apparent.

It appears from Craig *, that an adjudication *cognitionis cauſa* is the remedy which of all came lateſt. We have this author's expreſs authority for ſaying, that in his time it was a recent invention. Nor is this at all wonderful. For a renunciation to be heir, muſt to the anceſtor's creditors have been a puzzling circumſtance, when its legal effect is to reſtore the land to the ſuperior, who is liable for none of the vaſſal's debts.

Taking under review the foregoing innovations, to which we were inſenſibly led by the prevailing influence of the Roman law, it is probable, that the fiction of identity of perſon was firſt applied by our lawyers to the caſe where an heir regularly enters to the eſtate of his anceſtor. Being in this caſe beneficial to creditors, who have the heir bound as well as the eſtate, it gained credit, and obtained a currency. Nor was it attended with any inconvenience to creditors, at leaſt, while they had acceſs to appriſe, as formerly, the eſtate of their debtor, where the heir abſtained from entering. This, one ſhould think, was affording to creditors every privilege they could juſtly demand

* lib. 3. dieg. 2. § 23.

mand for obtaining payment. But this did not ſatisfy them. To have the heir bound perſonally, in place of his anceſtor, was an enticing proſpect; and the general charge was invented, in order to make him liable even where he has not taken the benefit of the ſucceſſion. This legal ſtep, it muſt be acknowledged, is well contrived to anſwer its purpoſe. The heir, urged by a general charge, hath no way to evade the certification of being perſonally liable, other than the hard alternative of renouncing altogether the ſucceſſion. This new form was much reliſhed. Creditors did not incline to confine themſelves to the eſtate of the anceſtor their debtor, while any hope remained of ſubjecting the heir perſonally, by means of a general charge. And accordingly for a century and a half, or perhaps more, it has been the conſtant method to ſet out with a general charge, where the heir is not entered. If this method to ſubject the heir perſonally prove ſucceſsful, the creditors, as made out above, muſt bid adieu to the eſtate conſidered as *in hereditate jacente* of their original debtor. Having choſen the heir for their debtor, they cannot now attach the eſtate otherwiſe than in quality of his creditors. Thus it has happened, that for many years there has been no inſtance of following out the old form by appriſing or adjudging the land after the debtor's death, without

out regarding the heir. Whether it may be thought too late now to return to this old form, governed by the principles of juſtice as well as of expediency, I take not upon me to determine.

The difference betwixt the law of Scotland and of England as to the preſent ſubject, will be clearly apprehended from what follows. A pure donation which doth not ſubject the donee to any obligation, transfers property without the neceſſity of acceptance; and upon that account, infants and abſents are benefited by ſuch deeds, without knowing any thing of the matter. But a deed laying the donee under any burden, beſtows no right without actual acceptance; if it did, any man might be ſubjected to the ſevereſt burdens without his conſent. Thus, in England, the rule obtains, *Quod mortuus ſaſit vivum;* becauſe an heir, though veſted in his anceſtor's heritage, is not ſubjected perſonally to his anceſtor's debts. In Scotland, the effects of the anceſtor are not tranſmitted to the heir, but by ſome voluntary act importing his conſent to ſubject himſelf to his anceſtor's debts. For by our law a ſtrict connection is formed, betwixt the right that the heir has to the anceſtor's eſtate and the obligation he is under to pay the anceſtor's debts, the latter being a neceſſary conſequence of the former. It may indeed happen, that the heir

heir is made liable to pay the anceſtor's debts, without being veſted in the eſtate; but this is to be conſidered as a penalty for refuſing to enter heir when he is charged, or for intermeddling irregularly with the anceſtor's effects, which are ſingular caſes.

The foregoing hiſtory is ſo ſingular, as not perhaps to have a parallel in the law of any country. Here, from the dead law of an ancient people, we find a metaphyſical fiction adopted, without any foundation in the common rules of juſtice, and repugnant to the common law of this iſland; and yet ſo fervently embraced, as to have made havock of every part of our law that ſtood in oppoſition. I have pointed out ſome of the many inconveniencies that its reception produced, with regard to creditors, and conſequently to credit. I have ſhown what ſubterfuges and fictitious contrivances were neceſſary, in order to give it a currency. I have ſhown how tedious, how intricate, and how expenſive a form it hath occaſioned, for recovering payment of debt. But I have not yet ſhown it in its worſt light; the evils I have mentioned, are mere trifles compared with thoſe that follow. No perſon who hath given any attention to the hiſtory of our law, can be ignorant of the numberleſs artifices invented by heirs in poſſeſſion of the family-eſtate, to ſcreen themſelves from paying the family

mily debts. The numberleſs regulations made in vain, age after age, to prevent ſuch artifices, will ſatisfy every one, that there muſt be an error in the firſt concoction, by which a remedy is rendered extremely difficult. How comes it that we never hear of ſuch frauds in England? The reaſon is obvious. The juſt and natural rule of a *ſeparatio bonorum*, which obtains there, makes it impracticable for the heir to defraud his anceſtor's creditors. They have no concern with the heir, but take themſelves to the anceſtor's eſtate for their payment. In Scotland, the anceſtor's eſtate cannot be reached even by his own creditors, otherwiſe than by attacking the heir, unleſs he be pleaſed to abandon it to them. But this ſeldom was done of old. The heir had a more profitable game to play, even where the eſtate was overburdened with debts. His method commonly was, to renounce to be heir in order to evade a perſonal decerniture. He did not, however, abandon the eſtate; it was not difficult to procure ſome artificial or fictitious title to the eſtate; under cover of which, poſſeſſion was apprehended; and this was a great point gained. If this title, after a dependence perhaps for years, was found inſufficient to bar the creditors, another title of the ſame kind was provided, and ſo on without end. It is true, the heir's renunciation entitles the creditors to attach the eſtate by adjudications

tions *cognitionis cauſa;* but then the heir, as has been obſerved, was provided with ſome collateral title, not only to colour his poſſeſſion, but alſo to compete with the creditors. In the mean time, the rents were a fund in his hands to take off any of the preferable creditors that were like to prove too hard for him. And ſuch purchaſe was a new protection to the unconſcientious heir, againſt the other creditors. In fact, the moſt conſiderable eſtates in Scotland, are poſſeſſed at this day by ſuch diſhoneſt titles; the legiſlature, however willing, never having been able to invent any complete remedy againſt ſuch pernicious frauds. The foregoing obſervations will enable us to trace theſe frauds to their true ſource. They may be juſtly aſcribed to the fiction of identity of perſon; becauſe by means of this fiction chiefly, opportunity was furniſhed for committing them. Had this matter been unfolded to our legiſlature, a very ſimple and very effectual remedy muſt have occurred to them. If the heir refuſed to ſubject himſelf to the debts of his anceſtor, nothing elſe was neceſſary but to reſtore the ancient law, authoriſing the anceſtor's heritage to be ſold for payment of his debts. But this regulation had been long in diſuſe, and we were no leſs ignorant of it, than if it never had exiſted.

And,

And, as an evidence of the weakneſs of human foreſight, I muſt obſerve, that a ſtatute made without any view to the frauds of heirs, proved more ſucceſsful againſt theſe frauds, than all the regulations purpoſely made; and that is the ſtatute for ſelling the eſtates of bankrupts. An heir has now little opportunity to play the accuſtomed game, when it is in the power of creditors to wreſt the eſtate out of his hands by public auction. And the experience now of fifty years, has vouched this to be a complete remedy. For we hear not at preſent of any frauds of this kind, nor are we under any apprehenſion of them. So far from it, that we are receding more and more, every day, from the rigid principle of an univerſal repreſentation, and approaching to the maxim of equity, which ſubjects not the heir beyond the value of the ſucceſſion. For what other reaſon is it, that the act 1695, introducing ſome new rigid paſſive titles is totally neglected, though it is undoubtedly an additional ſafeguard to creditors againſt the frauds of heirs? We are not now afraid of theſe frauds: They are prevented by the equitable remedy of ſelling the anceſtor's eſtate; and judges, if they have humanity, will be loath to apply a ſevere remedy, when a mild one is at hand, which is alſo more effectual. It is remarkable, that though the ſtatute for ſelling the eſtates of bankrupts proved an effectual remedy,

remedy, yet this virtue in the ſtatute was not an early diſcovery. It was not diſcovered at the time of the act 1695; and when that ſtatute was made, it muſt in a perſon of ſagacity have provoked a ſmile, to find our legiſlature, with their eyes open, contriving an imperfect remedy, when they had already, with their eyes ſhut, ſtumbled on one that was perfect.

TRACT

TRACT XIII.

Limited and Universal REPRESENTATION of HEIRS.

BY the law of nature, an heir, beyond what he takes by the succession, is not subjected to the debts of his ancestor. In the Roman law an artificial notion was adopted, that the heir is the same person with the ancestor. Hence an heir in the Roman law succeeds to all the effects of the ancestor, and is subjected to all his debts. This was carried so far with regard to children, that they were heirs *ex necessitate juris;* and upon that account were distinguished by the name of *sui et necessarii heredes.* Natural principles afterward prevailed; and children, in common with other heirs, were privileged to abstain from the succession. This was done by a *separatio bonorum*, and by abandoning the estate of the ancestor to his creditors. But still if the heir took possession of the ancestor's effects, or in any manner behaved as heir; he, from that moment, was understood to be *eadem persona cum defuncto*, and consequently was subjected universally to all

all the anceſtor's debts. At laſt the benefit of inventory was afforded, which protected the heir from being liable farther than *in valorem*. This privilege tempered the ſeverity of the foregoing artificial principle; and, in ſome meaſure, reſtored the law of nature, which had been overlooked for many ages.

In England, the artificial principle of identity of perſon never took place. An heir by the Engliſh law is not bound to pay his anceſtor's debts, even when he takes by ſucceſſion. The creditors have the privilege of attaching their debtor's effects poſſeſſed by the heir, in the ſame manner as when theſe effects were in the debtor's own poſſeſſion, during his life. The heir is perſonally liable to the extent only of what he intermeddles with. The Engliſh law, indeed, deviates from natural juſtice, in making a diſtinction betwixt heritable and moveable debts, ſubjecting the heir to the former only, and the executor to the latter. This is evidently unjuſt as to creditors; for they may be forfeited by their debtor's death, though he die in opulent circumſtances; which as to perſonal creditors muſt always happen, when his moveable funds are narrow and his moveable debts extenſive. Such a regulation is the leſs to be juſtified, that it furniſheth an opportunity for fraud. For what if a man, with a view to diſappoint his perſonal creditors after his death,

ſhall lay out all his money upon land? I know of no remedy to this evil, unleſs the court of chancery, moved by a principle of equity, venture to interpoſe.

By the Feudal law, when in purity, there could not be ſuch a thing as repreſentation; becauſe the heir took the land, not as coming in place of his anceſtor, but by a new grant from the ſuperior. But when land was reſtored to commerce, and was purchaſed for a full price, it was juſtly reckoned the property of the purchaſer, though held in the feudal form. Land by this means is ſubjected to the payment of debt, even after it deſcends to the heir. And in Scotland, probably, the privilege at firſt was carried no farther than in England, to permit creditors, after the death of their debtor, to attach his funds in poſſeſſion of the heir.

But as Scotland always has been addicted to innovations, the Roman law prevailed here, contrary to the genius of our own law; and the fiction was adopted of the heir and anceſtor being the ſame perſon. The fiction crept firſt into the reaſonings of our lawyers figuratively, in order to explain certain effects in our law; and gained by degrees ſuch an aſcendant, as, in our apprehenſion, to form the very character of an heir. Yet, conſidering that we acknowledge heirs of different kinds, an heir of line, an heir-male, an heir of proviſion, &c. one

ſhould

ſhould not imagine that our law lay open to have this fiction grafted upon it. In the Roman law there was but one heir who ſucceeded *in univerſum jus defuncti*, and who, by a very natural figure, might be ſtyled *eadem perſona cum defuncto*. But can we apply this figure, with any propriety, to an heir who ſucceeds not *in univerſum jus*, but is limited to a particular ſubject? This opens a ſcene which I ſhall endeavour to ſet in a juſt light, by examining how far the figure has been carried with us, and what bounds ought to be ſet to it.

Our law, in all probability, was once the ſame with that of England, viz. that the heir, who ſucceeds to the real eſtate, is liable to real debts only; the moveable debts being laid upon the executor. But this did not long continue to be our law. It muſt ſometimes have happened, notwithſtanding the frugality of ancient times, that the perſonal eſtate was not ſufficient for ſatisfying the perſonal debts. It was juſtly thought hard, that the heir ſhould enjoy the family eſtate, while the perſonal creditors of his father, or other anceſtor, were left without remedy. Equity dictates, that after the moveables are exhauſted, the perſonal creditors ſhall have acceſs to the land for what remains due to them. This practice is with us of an early date. We find it eſtabliſhed in the reign of David II. as appears from the Regiam Ma-

jeſtatem *. And it was improved to the benefit of creditors by act 76. parl. 1503, enacting, "That if the perſonal creditors are not paid "out of the moveables within the year, they "ſhall, without further delay, have acceſs to "the heir." Upon the ſame foundation, and by analogy of the ſtatute, the executor is made liable for the heritable debts. This came in late; for Sir Thomas Hope † obſerves, "That "the Lords of old were not in uſe to ſuſtain "proceſs againſt the executor for payment of "an heritable debt." And overlooking the equity of the innovation, he cenſures and condemns it; for a very inſufficient reaſon indeed; "becauſe (ſays he) there is no law to give the "executor relief againſt the heir, as the heir "has againſt the executor when he pays a "moveable debt;" as if this relief did not follow from the nature of the thing. Reviewing this hiſtorical deduction, I perceive not in it the ſlighteſt ſymptom of identity of perſon. This fiction admits not a diſtinction betwixt heritable and moveable ſubjects; identity of perſon beſtows neceſſarily upon the heir every ſubject that belonged to the anceſtor. Neither admits it any diſtinction among debts; for if the deceaſed was liable to all debts without diſtinction, ſo muſt the heir. In place of which we

* lib. 2. cap. 39. § 3.

† Minor Practicks, § 104.

we find the heir of line ſubjected by the common law to heritable debts only; and not to moveable debts, otherwiſe than upon a principle of equity, which, failing moveables, ſubjects the land-eſtate, rather than forfeit the creditors.

Thus the heir of line is ſubjected univerſally to his anceſtor's debts, without any foundation in the common law; and ſtood even without any foundation in the fiction itſelf. For as an heir of line is clearly not *eadem perſona cum defuncto*, except as to the heritable eſtate, it is equally clear, that by this fiction he ought not to be ſubjected univerſally to any debts but what are heritable. As to moveable debts, equity dictates that creditors be preferred to every repreſentative of their deceaſed debtor; and therefore that the land-eſtate ſhould be ſubjected to the perſonal creditors, when the moveables are not ſufficient. But this maxim of equity can never be extended farther againſt the heir, than to make him liable for moveable debts as far as he is benefited by the ſucceſſion; becauſe equity, which relieves from oppreſſion, can never be made the inſtrument of oppreſſion.

Next as to a limited heir ſucceeding to one ſubject only, is there any reaſon for making him liable univerſally to the anceſtor's debts? If he repreſent the anceſtor, it is not univerſally, but only as heir in a particular ſubject.

And therefore he ought to be liable for debts only which affect that ſubject, or for debts of the ſame kind with the ſubject, or at fartheſt for debts of every kind to the extent of the ſubject. I know not that it has been held by any able writer, far leſs decided, that an heir provided to a particular ſubject is liable univerſally to the anceſtor's debts. Dirleton gives his opinion to the contrary *. His words are: "Heirs of proviſion and tailzie who are to "ſucceed only *in rem ſingularem* albeit *titulo* "*univerſali*: *Quæritur* if they will be liable to "the defunct's whole debts, though far ex"ceeding the value of the ſucceſſion; or if "they ſhould be conſidered as *heredes cum be*"*neficio inventarii*, and ſhould be liable only "*ſecundum vires*, there being no neceſſity of an "inventory, the ſubject of their ſucceſſion be"ing only, as ſaid is, *res ſingularis?* Anſwer. "It is thought that if one be ſerved general "heir-male without relation to a ſingular ſub"ject (as to certain lands) he would be liable "*in ſolidum*; but if he be ſerved only ſpecial "heir in certain lands, he ſhould be liable on"ly *ſecundum vires.*"

The heir of line, or heir-general, is then the only perſon to whom the character of identity of perſon can with any ſhadow of reaſon be applied. Nor to him can it be applied in the unlimited

* Doubts. Tit. Heirs of Tailzie.

limited ſenſe of the Roman law; but only as to the heritable eſtate and heritable debts. To all that is carried by a general ſervice he has right, without limitation; and it is plauſible if not ſolid, that he ought to be liable without limitation to all heritable debts, ſuch as come under a general ſervice. We follow the ſame rule betwixt huſband and wife, when we ſubject him to her moveable debts in general, and give him right to all her moveable effects in general. And this at the ſame time appears to be the true foundation of the privilege of diſcuſſion, competent to heirs whoſe right of ſucceſſion is limited to particular ſubjects. The general heir, or heir of line, who is not thus limited but ſucceeds in general to all ſubjects of a certain ſpecies, is the only heir who ought to bear the burden of the debts.

It may be thought more difficult to ſay, why an heir of line, making up titles by a ſervice to a land-eſtate which was the property of his anceſtor, ſhould be ſubjected univerſally to his anceſtor's debts; when this very title, viz. his retour and ſeiſin, contains an inventory *in gremio*; not being in its nature a general title, but only a title to one particular ſubject.

To explain this matter, it will be neceſſary to carry our view pretty far back in the hiſtory of our law. Among all nations it is held as a principle, that property is transferred from the

dead to the living, without any ſolemnity. Children and other heirs are entitled to continue the poſſeſſion of their anceſtor; and where the heir is not bound for his anceſtor's debts, ſuch poſſeſſion is underſtood to be continued by will alone, without any ouvert act. In Scotland, the heir originally was not liable for the debts of his anceſtor, nor at preſent is he liable in England. Hence it is, that as to rent-charges, bonds ſecluding executors, and other heritable ſubjects, which may be termed *allodial* becauſe not held of any ſuperior, theſe were transferred to the heir of blood directly on his ſurvivance; and, with regard to theſe, the ſame rule obtained here, that obtains univerſally in England and France, *Quod mortuus ſaſit vivum*. Land and other ſubjects held of a ſuperior, are with us in a very different condition. The vaſſal, by the principles of the Feudal law, is not proprietor; and ſtrictly ſpeaking tranſmits no right to his heir. The ſubject muſt be claimed from the ſuperior; and the heir's title is a new grant from him. Thus then ſtood originally the law of Scotland. Heritable ſubjects veſted in the heir merely by ſurvivance. The ſingle exception was a feudal holding, which required, and ſtill requires a new grant from the ſuperior. If the heir of line had this new grant, he needed no other title to claim any heritable ſubject which belonged to his anceſtor. But

heirs

heirs were put in a very different ſituation, by the fiction of identity of perſon adopted from the Roman law. The heir by claiming the ſucceſſion being ſubjected perſonally to his anceſtor's debts, muſt have an election to claim or to abandon as it ſuits his intereſt. This of neceſſity introduced an *aditio hereditatis*, as among the Romans, without which the heir can have no title to the effects of his anceſtor. If he uſe this form, he becomes *eadem perſona cum defuncto* with regard to benefits as wells as burdens. If he abſtain from uſing it, he is underſtood to abandon the ſucceſſion, and to have no concern either with benefits or burdens. The only point to be conſidered was, what ſhould be the form of the *aditio*. By this time the property being transferred from the ſuperior to his vaſſal, it was juſtly thought, that the vaſſal's heir who enjoyed the land-eſtate of his anceſtor, could not evade payment of his debts. For this reaſon, an infeftment being the form eſtabliſhed for tranſmitting the property to the heir, the ſame form was now held as a proper *aditio hereditatis* to have the double effect, not only of veſting the heir with the property as formerly, but alſo of ſubjecting him to the anceſtor's debts. This title, it is true, being in its nature limited, ought not to ſubject him beyond the value of the ſubject. But then the identity of the anceſtor and his heir being once

eſtabliſhed,

eſtabliſhed, it was thought, as in the Roman law, to have an univerſal effect, and to be an active title to every ſubject that could deſcend to the heir of line. And our former practice tended mainly to ſupport this inference; for it was ſtill remembered, that formerly all allodial heritable ſubjects were veſted in the heir of line, upon his ſurvivance merely. The infeftment being thus held an *aditio hereditatis*, not only with reſpect to the land-eſtate, but with reſpect to all other heritable ſubjects, it was of courſe an univerſal paſſive title; for if the heir ſucceeded to all heritable ſubjects without limitation, it ſeemed not unreaſonable that he ſhould be ſubjected to all debts without limitation. Theſe concluſions, it muſt be owned, were far from being juſt or accurate. It appears extremely plain, that if a man die poſſeſſed of a ſubject held of a ſuperior, and of other heritable ſubjects that are allodial, the heir ought to be privileged to make a title to one or other at his pleaſure, and to be ſubjected accordingly to the debts; that if he uſe a general ſervice, he muſt lay his account to be liable univerſally; but that if he confine himſelf to a ſpecial ſervice, he is not to be liable beyond the value of the ſubject. But our ancient lawyers were not ſo clear-ſighted. They blindly followed the Roman law, by attributing to identity of perſon the moſt extenſive effects poſſible.

An

An infeftment in the land-eſtate eſtabliſhed the identity, which, it was thought, did on the one hand entitle the heir of line to all the heritable ſubjects, and on the other did ſubject him to all the debts. And this affords a clear ſolution of the difficulty above mentioned. If the identity of perſon take at all place, it applies to none more properly than to an heir of blood, who enters by infeftment; eſpecially as he generally is of the ſame name and family with his anceſtor, lives in the ſame houſe, poſſeſſes the ſame eſtate, and carries on the line of the ſame family.

But now ſuppoſing the foregoing deduction to be juſt, is there not great reaſon to alter our preſent practice, and to hold a ſpecial ſervice to be, as it truly is in its nature and form, a limited title? Let us ſuppoſe that the heir of line, unwilling to repreſent his anceſtor univerſally, chuſes to abandon all the heritable ſubjects, except a ſmall land-eſtate, to which he makes up titles by a ſpecial ſervice; why ſhould he be liable univerſally in this caſe: The natural conſtruction of ſuch a ſervice is, that the heir intends to confine himſelf to the ſubject therein mentioned, and to abandon the anceſtor's other eſtate, ſince he forbears to take out a general ſervice. Such conſtruction will better the condition of heirs, by removing ſome part of the riſk they run, and will not hurt creditors as far

as

as their claim is founded on natural equity, viz. to have their debtor's effects applied for payment of his debts.

And I muſt obſerve with ſome ſatisfaction, that we have given this very conſtruction to an infeftment on a precept of *Clare conſtat*; it being an eſtabliſhed rule, That ſuch infeftment is not a title to any other ſubject but that contained in the precept. And for this very reaſon, neither doth it make the heir liable for the debts of his anceſtor farther than *in valorem*. Lord Stair *, it is true, conſiders a precept of *Clare* as an univerſal paſſive title. But the court of ſeſſion entertained a juſter notion of that precept. A remarkable caſe is obſerved by Lord Harcus †, to the following purpoſe. "A man infeft upon a precept of *Clare conſtat* "as heir to his father, being purſued for pay- "ment of a debt that was due by his father; "pleaded an abſolvitor upon the following me- "dium, That he had no benefit by the ſucceſ- "ſion, the ſubject to which he had connected "by a precept of *Clare* being evicted from "him." It was anſwered, "That his enter- "ing heir by the precept of *Clare conſtat*, made "him *eadem perſona cum defuncto*; that it was "a behaviour as heir, which ſubjected him to "all his predeceſſor's debts, without regard to "the

* Inſtit. p. 467. at the bottom.

† Tit. *Heirs*, March 1683, Farmer *contra* Elder.

"the eſtate, whether it was ſwallowed up by "an earthquake, or evicted by a proceſs." The Lords "judged the defender not liable as "heir, in reſpect the land was evicted from "him." It was ſaid, "That had there been a "general ſervice, or a ſpecial ſervice which in-"cludes a general, the matter would have been "more doubtful; eſpecially if there were other "ſubjects to which a general ſervice gives "right." The plain inference from this judgment is, that if eviction of the land-eſtate relieve the heir from being liable to pay the family debts, the eſtate muſt be the meaſure of his repreſentation, and conſequently that he is not liable beyond the value.

This ſubject will perhaps be thought unneceſſary, now that the benefit of inventory is introduced into our law. It is indeed leſs neceſſary than formerly, but not altogether uſeleſs. In many inſtances heirs neglect to lay hold of this benefit; and frequently the forms required by the ſtatute are unſkilfully or careleſsly proſecuted, ſo as to leave the heir open to the rigour of law; in which caſes it comes to be an important enquiry, how far an heir is liable for the debts of his anceſtor. I cannot at the ſame time help remarking, that it ſhows no taſte for ſcience, to relinquiſh a ſubject, however beautiful, merely becauſe it appears not to be immediately

mediately uſeful. The hiſtory of law can never be uſeleſs. And, taking it upon the humbleſt footing, it enables us to compare our preſent with our former practice, which always tends to inſtruction.

TRACT

TRACT XIV.

OLD and NEW EXTENT.

THE Extents old and new make a part of our law that is involved in the dark clouds of antiquity. Theſe extents are not mentioned by our firſt writers, and later writers ſatisfy themſelves with looſe conjectures, the product of fancy without evidence. The deſign of the preſent eſſay is to draw this ſubject from its obſcurity, into ſome degree of light. It is a matter of curioſity, and poſſibly may be not altogether unprofitable, with relation eſpecially to our retours, of which theſe extents make an eſſential part.

As the Engliſh brieve of *Diem clauſit extremum* approaches the neareſt of any to our brieve of inqueſt, it may be of uſe to examine the Engliſh brieve, and the *Valent* clauſe therein contained. Fitz-Herbert, in his New nature of brieves *, explains this brieve in the following words. " The writ of *Diem clauſit extremum* " properly lieth, where the King's tenant, who " holdeth of him *in capite*, as of his crown, by " knights ſervice or in ſoccage, dieth ſeiſed, his

* p. 558.

" his heir within age or of full age, then that " writ out to iſſue forth, and the ſame ought to " be at the ſuit of the heir, &c. for upon that, " when the heir cometh of full age, he ought " to ſue for livery of his lands out of the King's " hands." And the writ is ſuch. " Rex di- " lect. ſibi W. de K. eſcheatori ſuo in Com. " Deven. Salut. Quia W. de S. qui de nobis " tenuit in capite, diem clauſit extremum, ut " accipimus; tibi praecipimus, quod omnia ter- " ras et tenementa de quibus idem W. fuit ſei- " ſitus in dominico ſuo ut de feodo in balliva " tua die quo obiit ſine dilatione cap. in ma- " num noſtram, et ea ſalvo cuſtodiri fac, donec " aliud inde praeceperimus, et per ſacramen- " tum proborum et legal. hominum de balliva " tua, per quos rei veritas melius ſcire poterit " diligent. inquiras, quantum terrae et tene- " mentorum idem W. tenuit de nobis in capi- " te, tam in dominico quam in ſervitiis, in bal- " liva tua die quo obiit, et quantum de aliis, " et per quod ſervic. et quant. terrae et tene- " menta illa *valent* per annum in omnibus exi- " tibus; et quo die idem W. obiit, et quis pro- " pinquior ejus heres ſit; et cujus aetatis: et " inquiſic. inde diſtincte et aperte fact. nobis in " cancell. noſtra ſub ſigillo tuo, et ſigillis eo- " rum per quos fact. fuerit, ſine dilatione mit- " tas, et hoc breve. Teſte," &c.

At what time the queſtion about the yearly rent

rent of the land was ingroſſed in this brieve, is uncertain; probably after the days of William the Conqueror; for as all the lands in England were accurately valued in that king's reign, and the whole valuations collected into a record, commonly called *Domes-day book*, this authentic evidence of the rent of every barony, was a rule for levying the king's caſualties as ſuperior, without neceſſity of demanding other evidence. But Domes-day book could not long anſwer this purpoſe; for when great baronies were diſmembered, each part to be held of the crown, this book afforded no rule for the extent of the caſualties to be levied out of the lands of the new vaſſals. An inquiſition therefore was neceſſary, to aſcertain the yearly rents of the disjoined parcels; and there could not be a more proper time for ſuch enquiry than when the heir of a crown vaſſal was ſuing out his livery. This ſeems to be a rational motive for ingroſſing the foregoing queſtion in the brieve. And in England, this enquiry was neceſſary upon a ſpecial account. It was not the cuſtom there to give gifts of the caſualties of ſuperiority. Officers were appointed in every ſhire to take poſſeſſion in name of the king of the lands of his deceaſed vaſſals, and to keep poſſeſſion till the heirs were entered. Theſe officers, called *eſcheators*, were accountable to the crown for the rents and iſſues, and for the other caſualties; and the rent

of the land aſcertained by the retour, was the rule to the treaſurer for counting with eſcheators.

There are two values or extents in the Scotch brieve, only one in the Engliſh brieve. I ſhall endeavour to trace the occaſion of the difference, after premiſing a ſhort hiſtory of our taxes; carrying the matter no farther back than we have evidence.

Taxes were no part of the conſtitution of any feudal government. The king was ſupported by the rents of his property-lands; and by the occaſional profits of ſuperiority, paſſing under the name of *caſualties*. Theſe caſualties, ſuch as ward, non-entry, marriage, eſcheat, &c. aroſe from the very nature of the holding; and beyond theſe the vaſſal was not liable to be taxed; ſome ſingular caſes excepted eſtabliſhed by cuſtom, ſuch as, for redeeming the king from captivity, for a portion to his eldeſt daughter, and a ſum to defray the expence of making his eldeſt ſon a knight. For this reaſon, it is natural to conjecture, that the firſt univerſal tax was impoſed upon ſome ſuch ſingular occaſion. The firſt event we can diſcover in the hiſtory of Scotland to make ſuch a tax neceſſary, happened in the reign of William the Lyon. This king was taken priſoner by the Engliſh at Alnwick, 12th July 1174; and in December that year, he obtained his liberty from Henry II. upon a treaty, in

in which he and his nobles ſubjected this kingdom to the crown of England *. Hector Boece our fabulous hiſtorian ſays, That upon this occaſion, William paid to Henry an hundred thouſand merks. But this ſeems to be aſſerted without any authority; the dependency of Scotland on the crown of England, was a price ſufficient for William's liberty, without the addition of a ſum of money; and the ſilence of all other hiſtorians, joined with the improbability that a ſum ſo immenſe could be paid, leave this author without excuſe.

Richard I. who ſucceeded Henry, bent upon a voyage to the holy land, ſtood in need of great ſums for the expedition. William laid hold of this favourable conjuncture, met Richard at York, and, upon paying ten thouſand merks Sterling, obtained from him a diſcharge of the treaty made with his father Henry; which was done by a ſolemn deed, dated the 25th December 1190, ſtill extant †.

The ſum paid to King Richard upon this occaſion was too great to be raiſed by the King of Scotland out of his own domains. It muſt have been levied by a tax or contribution; and there was a juſt cauſe for the demand, as the money was to be applied for reſtoring the kingdom to its former independency. But of this fact we have better evidence than conjecture. The

* Rymer, vol. 1. p. 39. † Ibid. vol. 1. p. 64.

monks of the Ciſtertian order having contributed a ſhare, obtained from King William a deed, declaring, That this contribution ſhould not be made a precedent in time coming *. "Ne quod "in tali eventu ſemel factum eſt, qui nec prius "evenit, nec in poſterum Deo miſerante futu- "rus eſt, ullo modo in conſuetudinem vel ſervi- "tutem convertatur; ut videlicit per quod ipſi, "pro redimenda regni libertate gratis fecerunt, "ſervitus iis imponatur." This, in all probability, is the firſt tax of any importance that was levied in Scotland; and though our hiſtorians are altogether ſilent as to the manner, the deed now mentioned proves it to have been levied by voluntary contribution, and not by authority of parliament, which in thoſe days probably had not aſſumed the power of impoſing taxes.

The next tax we meet with, is in the days of Alexander II. ſon to the above-mentioned William. This king made a journey the length of Dover, and his ready money being exhauſted, he procured a ſum by pledging ſome lands, to redeem which he levied a tax. This appears from a deed, *anno regni* 15°, in which he declares, that the monaſtery of Aberbrothock, having aided him on this occaſion, it ſhould not turn to their prejudice †.

Alexander

* Appendix to Anderſon's Eſſay on the independency of Scotland, No. 21.

† Chartulary of Aberbrothock, fol. 74.

Alexander III. married Margaret, daughter to Henry III. of England, and was in perfect good understanding with that kingdom during his whole reign. He was but once obliged to take up arms, and the occasion was, to resist an invasion by Acho King of Norway, who landed at Ayr, August 1263. Nor was this war of any continuance: Acho was defeated on land, and his fleet suffered by a storm, which obliged him to retire not many months after his landing. Alexander, some years after, viz. 25th July 1281 *, contracted his daughter Margaret to Eric the young King of Norway, and bound himself for a tocher of 14,000 merks Sterling; a fourth part to be instantly advanced, a fourth part to be paid 1st August 1282, a fourth part 1st August 1283, and the remaining fourth 1st August 1284; but providing an option to give land for the two latter shares, at the rate of 100 merks of rent for 1000 merks of money.

This sum, which Alexander contracted in name of portion with this daughter, amounted to about 28,000 l. Sterling of our present money †; too great a sum to be raised out of his own funds; and as by law he was intitled to demand aid from his vassals upon this occasion, the sum must have been levied by some sort of tax or contribution. He had recent authority

* Rymer, vol. 2. p. 1079.

† Ruddiman's preface to Anderson's Diplomata Scotiæ.

for laying this burden upon his ſubjects, viz. that of his father-in-law Henry III. * ; and if his ſubjects were to be burdened equally, it was neceſſary to aſcertain the value of all the lands in the kingdom. Poſſibly he might take a hint of this valuation from the ſtatute 4th Edward I. *anno* 1276, directing a valuation to be made of the lands, caſtles, woods, fiſhings, &c. of the whole kingdom of England. And the rent aſcertained by ſuch valuation got the name of *extent*; becauſe the lands were eſtimated at their utmoſt value or extent †. One thing is certain, that there was a valuation of all the lands of Scotland in the reign of Alexander III. the proof of which ſhall be immediately produced; and there is not upon record any event to be a motive for an undertaking ſo laborious other than that of levying the ſaid ſum.

Alexander III. left no deſcendants but a grand-daughter, commonly called the *Maid of Norway*; and ſhe having died unmarried and under age, Scotland was miſerably harraſſed by Edward I. of England, who laid hold of the opportunity of a diſputed ſucceſſion to enſlave this kingdom. Robert Bruce, unwearied in oppoſition, got peaceable poſſeſſion of the crown, *anno* 1306; and though he ſeized on the lands belonging to Baliol and the Cummins, and made

* Spelman's Gloſſary, *voce* Auxilium.

† Cowel's Dictionary, *voce* Extent.

made conſiderable profit by leſſening the weight of money in the re-coinage; yet, by a long train of war and inteſtine commotions, the crown-lands were ſo waſted, that toward the end of his reign it became neceſſary to petition the parliament for a ſupply. Upon the 15th July 1326, the parliament being convened at Cambuſkenneth, the laity agreed to give him during his life the tenth penny of all their rents, *tam infra burgos et regalitates quam extra*, "according to "the old extent of the lands and rents in the "time of Alexander III." This curious deed, a copy of which is annexed *, contains an exception in theſe words: "Excepta tantummodo "deſtructione guerrae, in quo caſu fiet deciden-"tia de decimo denario praeconceſſo, ſecundum "quantitatem firmae, quae occaſione praedicta "de terris et redditibus praedictis levari non "poterit, prout per inquiſitionem per vicecomi-"tem loci fideliter faciendam poterit reperiri."

Here is complete proof of a valuation in the reign of Alexander III. named in the indenture, the *Old extent*. And as the neceſſity of a ſupply affords intrinſic evidence that the tax was levied, we have no reaſon to doubt, but that every man whoſe rents had fallen by the diſtreſſes of war, took the benefit of the foregoing clauſe, to get his lands revalued by the ſheriff, that he might pay no more than a juſt proportion of the tax.

* Appendix, No. 5.

We have now materials ſufficient for an explanation of the *Valent* clauſe in our retours. At what time it came into practice, is altogether uncertain. If this clauſe was not made a part of the brieve of inqueſt before the days of Alexander III. there was little occaſion for it, after the extent made in that reign, till the great baronies were ſplit into parts, and the king's vaſſals were multiplied. One thing we may rely on as certain, that before the 1326, when the ſaid indenture paſſed between King Robert and his parliament, one extent only was mentioned in retours, viz. that of Alexander III. Nor before that period was there any occaſion for a double extent here more than in England. Of this we may be convinced from what follows. In levying the caſualties of ſuperiority, ſuch as, ward, non-entry, &c. it was not the genius of this country, to ſtretch ſuch claims to the utmoſt, by ſtating the juſt and true rent of the land upon every occaſion. Such a fluctuating eſtimation, ſevere upon vaſſals, would at the ſame time have been troubleſome to ſuperiors. The king, and in imitation of him other ſuperiors, were ſatisfied with a conſtant fixed rent to be a general rule for aſcertaining the caſualties, without regarding any occaſional increaſe or diminution of rent. The extent in the reign of Alexander III. was probably the full rent, and muſt have continued a pretty juſt valuation

for

for many years. This extent then became the univerſal meaſure of the caſualties of ſuperiority. If a barony remained entire as in the days of Alexander III. there was no occaſion for witneſſes to prove the rent; it was found in the rolls containing the old extent. If a barony was ſplit into parts, the rent of the ſeveral parcels was found in the retours, being a proportion of the old extent of the whole. Hence this *quære* in the brieve, *Quantum valent dictæ terræ per annum*, came to have a fixed and determined meaning; not what theſe lands are worth of yearly rent at preſent, but what they were worth at the laſt general valuation; or, in other words, what they are computed to in the rolls containing the old extent.

Thus ſtood the extent at the date of the indenture 1326; which laid a foundation for a revaluation, not of the whole lands in Scotland, but only of what were waſted by war. Suppoſing now ſuch a revolution, of which we can entertain no doubt when it was in favour of vaſſals, it muſt have been the rule, not only for levying the tax then impoſed, but alſo for aſcertaining the caſualties of ſuperiority. If ſo, it was neceſſary to take notice of this new valuation in the retours of theſe lands; and conſequently in the brieve, which was the warrant of the retour. The clauſe, *Quantum valent*, contained in the brieve, could not anſwer this purpoſe;

purpoſe; becauſe that clauſe regarded only the old extent, and was a queſtion to which the old valuation of the land was the proper anſwer. A new clauſe therefore was neceſſary, and the clauſe that was added, points out ſo preciſely the revaluation authoriſed by this indenture, as to afford real evidence, that the clauſe muſt have been contrived ſoon after it. The clauſe as altered runs thus: *Et quantum nunc valent dictæ terræ, et quantum valuerunt tempore pacis.* It was extremely natural to characterize the old extent by the phraſe *tempore pacis*, not only as made in a peaceable reign, but alſo in oppoſition to the new extent occaſioned by the devaſtation of war. I need only further remark, that it was neceſſary to engroſs the new clauſe in every brieve; becauſe, with reſpect to any particular land-eſtate, it could not beforehand be known whether it had been waſted by war or not.

But, beſide conjecture, there are poſitive facts to put this matter beyond controverſy. I have not hitherto diſcovered a retour of land held of the king, ſo ancient as the 1326; but of that period there are preſerved authentic copies of many retours of lands held of biſhops, monaſteries, &c. who had the privilege of a chancery. And we have no reaſon to doubt, but that the great barons who had this privilege, were ambitious of copying after the king's chancery in every

every article. The first retour I shall mention, happens to be a very lucky authority; for it verifies a fact mentioned above upon the faith of conjecture, that at the date of the indenture 1326, there was but one extent mentioned in the brieve and retour. The retour I appeal to, is that of the land of Orroc in the county of Fife, held of the abbey of Dunfermline, dated the 20th May 1328, the *Valent* clause of which runs thus: *Item dicunt quod prædictæ terræ de Orroc valent per annum* 12 *l.* This retour at the same time shows, that the alteration in the *Valent* clause was not then introduced; which is not wonderful, when the retour is but a year and ten months after the indenture (1). The most ancient retour I have seen after that now mentioned, bears date in the 1359, being of land held of the same abbey. Before this time, probably several years, the alteration of the *Valent* clause was made; for in this retour it runs thus: *Et dictae terrae valebant tempore bonae pacis L.* 13 : 6 : 8, *et nunc valent L.* 10 : 13 : 7. There are in that period many other retours mentioning

(1) Since writing what is above, I have seen a copy, not, properly speaking, of a retour, but of a valuation of the lands of Kilravock and Easter-Gedies, *anno* 1295, in which the *Valent* clause runs thus: "Quod terra de "Kilravock cum omnibus pertinentiis suis, sciz. cum mo- "lendinis, bracinis, quarellis, et bosco, valet per annum "24 lib. item dixerunt quod terra de Easter-Gedies cum "molendino et bracinis valet per annum 12 lib."

mentioning two extents, diſtinguiſhing them in the ſame manner. And uniformly the *valuerunt tempore pacis* is greater than the *nunc valent*; which puts it paſt doubt that the *nunc valent* refers to the new extent authoriſed by the ſaid indenture. Some retours indeed there are of that period, where the *valuerunt tempore pacis* and the *nunc valent* are the ſame. But it is eaſy to account for that circumſtance; becauſe from the indenture it appears, that but a part of our lands were waſted by war; and the retours now mentioned muſt be of lands which were not ſo waſted.

Down to the days of our James I. the two extents mentioned in retours, were thoſe of Alexander III. and Robert Bruce. In James's reign we obſerve an alteration, which cannot be explained without proceeding in the hiſtory of the public taxes. The next tax that deſerves to be taken notice of, was in the reign of David II. This king was taken priſoner by the Engliſh at the battle of Durham *anno* 1346, and was releaſed *anno* 1365; after agreeing to pay for his ranſom 100,000 l. Sterling, within the ſpace of twenty-five years. And there is good evidence that the whole was paid before the year 1383 *. This immenſe debt, contracted for redeeming the king from captivity, came to be a burden upon his vaſſals, by the very conſtitution

* Rymer, vol. 6. p. 464.; vol. 7. p. 417.

ſtitution of the Feudal law, abſtracting from the authority of parliament. It muſt therefore have been levied as a public tax, which appears to be the caſe from the rolls of that king ſtill extant in exchequer. And as there is no veſtige of any new valuation at this time, the old extent, viz. that of Alexander III. muſt have been the rule; except where altered by the partial valuation in the reign of Robert I. And what puts this paſt doubt is, that the new extent continued to be lower than the old extent, or extent *tempore pacis*, during this king's reign, and until the reign of James I.

James I. having been many years detained in England, obtained his liberty upon giving hoſtages for payment of 40,000 l. Sterling, demanded under the ſpacious title of alimony. Of this ſum 10,000 l. was remitted by Henry IV. at that time King of England, upon James's marrying a daughter of the Duke of Somerſet. In the parliament 1424, proviſion was made for redeeming the hoſtages by a ſubſidy granted of the twentieth part of lands, moveables, &c. *. In order to levy this tax, a valuation was directed of lands as well as of moveables. And this new valuation of lands became proper, if not neceſſary, upon the following account, that the reaſon for making the new extent in the 1326, no longer ſubſiſted. The lands which at that

* Black Acts, p. 1624. c. 10. 11.

that time had been waſted by war, were now reſtored to their wonted value; and yet without a new valuation, theſe lands could only be taxed according to the extent 1326. And with this ſpecial reaſon concurred one more general, which is, that an extent, if the commerce of land be free, cannot long be a rule for levying public taxes. For by ſucceſſion, purchaſe, and other means of acquiring property, parcels of land are united into a whole, or a whole ſplit into parcels, which acquire new names, till by courſe of time it comes to be a matter of uncertainty, what lands are meant by the original name preſerved on record. This reaſon ſhows the neceſſity of new extents from time to time; for after the connection betwixt land and the name it bears in the extent-rolls is loſt, theſe rolls can no longer be of uſe for proportioning a tax upon ſuch land.

It was appointed by the act impoſing the ſubſidy, that this extent ſhould be made and put in books, betwixt and the 13th July then next; and that it was made, and alſo that the ſubſidy was levied, appears from the continuator of Fordon *. He reports, that it amounted the firſt year to 14,000 merks, that the ſecond year it was much leſs, and the people beginning to murmur, that the tax was no longer continued. But we have ſtill a better authority than the continuator

* L. 16. cap. 9.

continuator of Fordon, to prove that the extent was made, viz. ſeveral retours recently after the 1424, where the new extent is uniformly greater than the old extent, or extent *tempore pacis*. Theſe muſt refer to ſome late extent, and not to the extent 1326, which was uniformly leſs than the old extent. Of theſe retours the moſt ancient I have met with is dated 1431, being of the lands of Blairmukis, held of the Baron of Bothvill, in which James de Dundas is retoured heir to James de Dundas his father, "Qui jurati dicunt quod dictae terrae nunc va-"lent per annum 20 mercas, et valuerunt tem-"pore pacis 100 ſolidos *."

As there was a new extent of the whole lands of Scotland, which muſt have been the rule for levying the caſualties of ſuperiority as well as the tax then impoſed, one is led to enquire, what was the uſe of continuing in the brieve of inqueſt the *quaere* about the two different extents? Why not return to the ancient form, ſpecifying one extent only, viz. the preſent extent? In anſwer to this, it muſt be yielded, that there could lie no objection to this innovation had it been intended. But by this time the rule had prevailed of preſerving inviolably the ſtyle of judicial writs; and as to queſtions ſo eaſy to be anſwered, the innovation probably

* This retour is in the hands of Sir John Inglis of Cramond.

bly was reckoned a matter of no ſuch importance, as to occaſion an alteration in the ſtyle of the brieve of inqueſt. One thing is certain, that the ſtyle remains the ſame without any alteration ſince the days of King Robert I. The brieve and retour obtained however a different meaning; ſo far as that the *nunc valent*, by which formerly was meant the extent 1326, came afterward to mean the extent 1424. For inſtance, the retour of the lands of Tullach, held of the abbey of Aberbrothick, bearing date 1438, has the *valent* clauſe thus: *Valent per annum L.* 33 : 6 : 8, *et tempore pacis valuerunt L.* 10. Another inſtance is a retour of the lands of Forglen, held of the ſame abbey, dated 1457, *Valent nunc per annum* 20 *merks, et valuerunt tempore pacis L.* 10. That by the *nunc valent* in theſe two retours muſt be meant the late extent of James I. is evident from the following circumſtance, that inſtead of being leſs than the extent *tempore pacis*, which the extent 1326, conſtantly was, it is conſiderably greater.

As the extent 1424, was uniformly engroſſed in every retour, in anſwer to the *quantum nunc valent* in the brieve, this practice came to be exceeding favourable to vaſſals in counting for the caſualties due by them; becauſe in every ſuch account this extent was taken for the true rent of the land. By the gradual ſinking of the value of money and the improvement of land,

land, the benefit which vaſſals had by this form of ſtating accounts, came to be too conſiderable to be overlooked. The value of the king's caſualties by this means gradually diminiſhing, the matter was taken under conſideration by the legiſlature, and produced the act 55. parl. 1474, ordaining, "That it be anſwered in the re-"tour, of what avail the land was of old, and "the very avail that it is worth and gives, the "day of ſerving the brieve."

I once inclined to think, that it is not the meaning of this ſtatute to require a new proof of the rent of land every time it is retoured upon a brieve of inqueſt. I ſuſpected that the ſtatute referred to ſome late general valuation. And I was encouraged to embrace this opinion, on finding in the records of parliament *, a tax impoſed of 3000 l. for defraying the expence of an embaſſy to Denmark, and a general valuation appointed in order to levy that tax. Commiſſioners are named to take the proof, and certain perſons appointed, one out of each eſtate, to receive the ſums that ſhould be levied. And that this muſt have been the caſe, appeared probable, upon finding that the new extent, even after this period, was no leſs uniform than formerly, and therefore that it could not correſpond to the true rent of land, which is in a continual fluctuation. But if after all there enſued

* 1467, acts 74. 79. 86.

ſued no new valuation of the land-rent of this kingdom, of which there is not the ſlighteſt veſtige; the ſtatute muſt be taken in its literal meaning, becauſe it can admit of none other. I have ſtill better authority for adhering to the literal meaning, viz. the proceedings of the ſovereign court, while the ſtatute was freſh in memory. The Earl of Bothwell, donatar to the relief and nonentry of the barony of Balinbreich, brought a reduction againſt the Earl of Rothes of his retour of that barony, becauſe it was retoured to 200 merks only for the new extent, though the rent really amounted to a much greater ſum. It was proved before the court, that the barony paid 500 merks of rent; and upon that medium the retour was reduced *. And the like was done with reſpect to the retour of the lands of Shield aud Drongan, which were retoured to 42 l. of new extent, and yet were proved by witneſſes to be 100 merks of yearly rent †.

In the retours accordingly that bear date recently after the ſtatute, we find a ſudden ſtart of the new extent, and a much greater diſproportion than formerly betwixt it and the old extent. In the chartulary of the abbey of Aberbrothick, there is a copy of a retour of certain lands, dated *anno* 1491, the particulars of which

* 22d October 1489.

† 13th February 1499, The King *contra* Crawford.

which are, *Terrae de Pittarow valent nunc L.* 22, *tempore pacis L.* 8. *Terrae de Cardinbegy valent nunc L.* 13, *et tempore pacis L.* 5. *Terrae de Auchingarth valent nunc* 5 *merks, tempore pacis* 2 *merks.* In the chartulary of the abbey of Dunfermline there is a copy of a retour of the lands of Clunys, held of that abbey, bearing date *anno* 1506, *Valent nunc* 50 *merks, et tempore pacis L.* 4. I have had occaſion to mention a retour of the lands of Forglen, held of the abbey of Aberbrothick, dated *anno* 1457, of which the new extent is 20 merks, and the old extent is 10 l. In the ſame chartulary, there is luckily another retour of the ſame lands, bearing date *anno* 1494, of which the *valent* clauſe is in the following words, *Valent nunc L.* 20, *et valuerunt tempore pacis* 20 *merks.* The difference in ſo ſhort a time as thirty-ſeven years betwixt 20 merks and 20 l. of new extent, is real evidence, that the act of parliament was duly obſerved in making out the retour laſt mentioned. But from the compariſon of theſe two retours, a more curious obſervation occurs, viz. that retours of lands held of ſubject-ſuperiors, are not much to be relied on as evidence of the old extent. In the firſt of theſe retours the old extent is ſtated at 10 l. in the other at 20 merks; occaſioned by a blunder of the inqueſt, who engroſſed as the old extent in the retour they were forming, the new extent contained in the for-

mer retour. Many ſuch blunders would probably be diſcovered, had we a full record of old retours. And it need not be ſurpriſing, that in ſuch retours little attention was given to the *valent* clauſe, which was reckoned a matter merely of form. For though the public taxes were levied from the king's vaſſals according to the old extent, yet in proportioning the relief which a baron had againſt his own vaſſals, the true rent was certainly made the rule. The new extent was of more conſequence, becauſe it was the rule for the nonentry-duties, before a declarator of nonentry was raiſed by a baron againſt the heir of his vaſſal.

It may be remarked here by the by, that the act 1474, is real evidence of a flouriſhing ſtate of affairs after our James I. got poſſeſſion of his throne. From the valuation 1424, till the ſaid act, there paſſed but fifty years; and the land-rent of Scotland muſt have increaſed remarkably during that period, to make the act 1474 neceſſary. But that monarch in his younger years was diſciplined in the ſchool of adverſity. During a tedious confinement of eighteen years, he had ſufficient leiſure to ſtudy the arts of government, and probably he made the beſt uſe of his time. It is certain, that before his reign we had no experience and ſcarce any notion of a regular government, where the law bears

ſway,

ſway, and the people peaceably ſubmit to the authority of law. But to return to our ſubject.

As by the ſtatute now mentioned the ſuperior's caſualties were raiſed to their higheſt pitch, it was impracticable to ſupport them long at that height, in oppoſition to the general bias of the nation in favour of vaſſals. The notion had been long ago broached and was now firmly eſtabliſhed, that the vaſſal is proprietor, and conſequently that ward, relief, and nonentry are rigorous and ſevere caſualties. We have Spottiſwoode's authority in his Hiſtory of the Church of Scotland, that loud complaints were made againſt theſe caſualties, early in the reign of James IV. But why at this period in particular? for we do not find the ſame complaints afterward; at leaſt they make no figure in the annals of more recent times. The act we have been diſcourſing about, affords a ſatisfactory anſwer. Theſe caſualties, by authority of the ſtatute, were more rigorouſly exacted than formerly. And we ſhall now proceed to ſhow, that they were very ſoon brought down to a moderate pitch, notwithſtanding the ſtatute. In ſerving a brief of inqueſt, the practice did not long continue, of taking a proof by witneſſes of the true rent of the land. If the land was once retoured as preſcribed by the ſtatute, the old and new extent engroſſed in that retour were continued in the following retours. If

there was no retour, a proportion of the old and new extent of the whole barony was taken. And where that was not to be had, it was the method to engroſs a new extent bearing a certain proportion to the old extent. For the laſt we have Skene's authority (*voce* Extent). His words are, "The Lords of Seſſion eſteem "a merk-land of old extent to four merk-land "of new extent." And he cites a deciſion, viz. 21ſt March 1541, Kennedy *contra* Mackinnald, which ſeems to import ſo much; though but obſcurely, becauſe the caſe is not diſtinctly ſtated. The proceſs being for the nonentry-duties of a five-merk land, it is ſaid to have been proved, that the land paid of rent four merks for every one of the ſaid five merks; and I muſt acknowledge, that the manner of expreſſion ſeems to point at ſome general rule, rather than at a proof by witneſſes. If this be the meaning of the deciſion, it is the firſt caſe I have obſerved, where this deviation from the ſtatute was authoriſed by the ſovereign court; and a notable deviation it was, to take ſuch an imaginary rule for aſcertaining the rent of the land, when the ſtatute directed a proof by witneſſes of the true rent. But when the act came once to be neglected, the court was more explicit in their judgments on this point. In a caſe obſerved by Balfour, (title, *Of Brieves and Retours*), 17th July 1562, Queen's Advocate and Lord

Lord Drummond *contra* George Muſhet, a general rule is eſtabliſhed directly in face of the ſtatute; which is, That when lands pay farm-victual, poultry, &c. the inqueſt are not bound to take inquiſition of the yearly rent, nor to convert ſuch caſualties into money. And the reaſon given is remarkable, viz. that the price of ſuch caſualties is ſo changeable, that no certain or fixed ſum can be aſcertained. This is a very bad reaſon upon the plan of the ſtatute, though it ſerves to ſhow the ſenſe of the nation, which the ſtatute had not eradicated, that the new extent ought to be fixed and uniform as well as the old. At the ſame time, as the land-rent in Scotland was generally paid in corn, this deciſion was in effect a repeal of the ſtatute; of which, we need not doubt, that proprietors whoſe rents were paid in money would take advantage. The act 1474, came in this manner to be univerſally neglected; and it was eſtabliſhed as a matter of right, that the new extent ſhould always be lower than the true rent: The act 6. parl. 1584, impowering the king to feu out his annexed property, has the following clauſe. "Providing always that the "faidis infeftments of feuferme be not made "within the juſt avail, to the prejudice and "hurt of our Sovereign Lord and his ſucceſs-"oures: That is to ſay, within the dewtie to "the quilkis the ſaidis landis are retoured, or

"may be juſtly retoured, for the new extent. "Quhilk new extent his hieris, with advice "forſaid, declaires to be the juſt avail of the "ſaidis lands, for the quhilk the ſamen may be "ſet in feu-farm." Here it is clearly ſuppoſed, that the new extent is a favourable eſtimation of the rent, and lower than what is truly paid for the land.

N. B. For the materials employed in this tract, the author is indebted to Mr John Davidſon clerk to the ſignet, whoſe extenſive knowledge reflects honour upon the ſociety to which he belongs.

APPENDIX.

APPENDIX.

NUMBER I.

Form of a Letter of SLAINES; referred to p. 39.

TO all and ſundrie whom it effeirs, to whoſe knowledge thir preſents may come, Me
relict of the deceaſt
and taking burden for the children lawfully procreat betwixt me and my ſaid deceaſt huſband, now in their minoritie; as alſo we
neareſt of kinne and tutores of lyne to the children procreat as ſaid is, and all of us, with one conſent and aſſent, and takeing burden on us for the bairnes, in reſpect of their minoritie and leſſer age, lawfully procreat betwixt the ſaid deceaſt
and me the ſaid
Greeting in God Everlaſting. Forſwameikleas we, in conſideratione of the repenting heart inwardly had, and manifeſted, declared, and ſhowne to us, be
for the accidental
ſlaughter of the ſaid deceaſt
committed be him ſuddenly, without aney deſigne or forethought fellonie, upon the
day of laſt bypaſt, Jaj viiC
years; and alſo becauſe the ſaid

and

and others in his name, have made condigne ſatisfactione to us for the ſaid ſlaughter, and hath made payment to us of certaine ſoumes of money, in name of kinboot and aſſythment: Thairfore, and for certaine other good cauſes and conſiderationes moving us, we, with one conſent, and takeing burden as ſaid is, have remitted, forgiven, and diſcharged, and be the tenor heirof freelie remits, forgives, and diſcharges, the ſaid

of all malice, rancor, grudge, hatred, envy of heart, and all occaſiones of actiones, civil or criminal, which we, or aney of us, had, has, or aney wayes may have in time comeing, againſt the ſaid

for the ſaid cryme; and, be thir preſents, receave him in ſuch amitie, friendſhip, and heartie kyndneſs, as he was with us before the committing of the ſaid cryme, and as the ſamen had never been committed: And we the forenamed perſones, for ourſelves, and in name and behalf of the ſaid children procreat as ſaid is, in reſpect of their minoritie and leſſer age, binds and obleidges us, That the ſaid ſhall never be called, perſued, be way of deed or otherwayes, in or by the law, be us, or aney of us, for his committing of the ſaid ſlaughter, in tyme comeing, under the paine of perjurie, defamatione, tinſell of faith, truth, and credit: And alſo we, for ourſelves, and in name foreſaid, be thir preſents, will and grant, That the ſaid ſhall not ſuffer exyle, baniſhment, or aney trouble whatſomever, throw the premiſſes: Moſt humbly beſeeching his Moſt Gracious Majeſtie to grant alſo a pardone and remiſſione, under the great ſeale, in moſt ample forme, to the ſaid

for the foreſaid cryme: Likeas we, or any of us, binds and obleidges us to renew, reforme, reiterat, ratifie, and approve, thir preſents, alſe oft and whenſoever we, or aney of us, beis required thereto, in the moſt ample forme. In witneſs, &c.

NUMBER II.

Copy of a ſeiſin, which proves, that the JUS RETRACTUS was the law of Scotland in the fifteenth century; as obſerved p. 113.

IN DEI nomine, Amen. Per hoc praeſens publicum inſtrumentum cunctis pateat evidenter, Quod anno ab incarnatione ejuſdem 1450, menſis vero Januarii die antepenultima, indictione 14ta Pontificatus Sanctiſſimi in Chriſto Patris ac Domini noſtri Domini Nicholai divina providentia Papae Quinti anno quarto, In mei notarii publici et teſtium ſubſcriptorum praeſentia perſonaliter conſtitutus providus vir Robertus Gyms burgenſis de Linlithgow expoſuit qualiter per breve Domini noſtri Regis de compulſione legittime obtinuit ſuper haereditate quondam Johannis Gyms fratris ſui ſummam octoginta quindecem librarum coram balivis dicti burgi in curia, pro qua quidem ſumma balivi tunc temporis exiſtentes ſibi poſſeſſionem de tenemento dicti quondam Johannis ex parte occidentali fori jacente ex aviſamento conſilii tradiderunt. Et quia dictus Robertus, magna neceſſitate compulſus, dictum tenementum alienare propoſuit, ad ſuae vitae neceſſaria ſupportanda, eo quod nullus alius amicorum inventus fuerat qui ſibi tempore neceſſitatis ſuccurrere propoſuit excepta ſolummodo Thoma de Forreſt ejus conſanguineo, prefatus Robertus ballivos dicti burgi cum inſtantia ſpecialiter ſupplicavit quatenus ſecum uſque ſolum dicti tenementi properare curarent, quo facto dictus Robertus totum jus et clameum quod in dicto tenemento habuit ratione dictae ſummae recuperatae praefato

fato Thomae de Forreſt ſurſum reddidit ac ſibi poſſeſſionem corporalem exinde tradidit per manus honorabilis viri Alexandri de Hathwy tunc temporis ballivi dicti burgi ſibi et haeredibus ſuis et aſſignatis futuris temporibus permanſuram quouſque de dicta ſumma principali plenarie fuerit ſatisfactum, ſuper quibus omnibus et ſingulis dictus Thomas de Forreſt a me notario publico infra ſcripto ſibi fieri petiit publicum inſtrumentum. Acta fuerunt haeç ſupra ſolum dicti tenementi hora quaſi ſecunda poſtmeridiem anno Dei menſe indictione et pontificatu quibus ſupra, praeſentibus providis viris David de Crawfurd Johanne Kemp ballivis, Thoma de Foulis Johanne Simſon Thoma Henriſon Henrico Cauchlyng Johanne Collano et Johanne Chalon ſerjandis cum multis aliis teſtibus ad praemiſſa vocatis ſpecialiter et rogatis.

Et ego Jacobus de Foulis clericus Sancti Andreae dioceſios publica authoritate imperiali notarius praedictis omnibus et ſingulis dum ſic ut praemittitur fierent et agerentur una cum praenominatis teſtibus praeſens perſonaliter interfui, eaque ſic fieri dici, vidi et audivi, indeque praeſens inſtrumentum aliena manu ex meo mandato ſcriptum confeci et meis ſigno et ſubſcriptione manu propria roboravi una cum appenſione ſigilli dicti Alexandri Hathwy ballivi propter majoris roboris et teſtimonium premiſſorum.

NUMBER III.

Copies of TWO RENT-CHARGES; referred to p. 171.

1. *Bond Sir Simon Lockhart of Ley, to William of Lindsay Rector of the church of Ayr, for an annualrent of L. 10 Sterling out of the lands of Ley,* anno 1323.

[*The principal is in the charter-cheſt of John Lockhart of Ley.*]

OMNIBUS hanc cartam viſuris vel audituris Simon Locard miles dominus de Lay et Cartland infra vicecomitatem de Lanerk ſalutem in Domino ſempiternam. Noveritis univerſitas veſtra me pro me et haeredibus meis quibuſcunque conceſſiſſe et vendidiſſe ac praedictas conceſſionem et venditionem praeſenti carta confirmaſſe diſcreto viro domino Willielmo de Lindeſay rectori eccleſiae de Ayr decem libras Sterlingorum annui reditus percipiendas annuatim in terris meis de Cartland et de Lay praedictis pro quadam ſummae pecuniae mihi prae manibus perſolutae de qua teneo me bene contentum, ſolvendum praedictum annuum reditum praefato domino Willielmo haeredibus ſuis et ſuis aſſignatis in maneriei loco de Lay ſupradicto per me et haeredes meos ad duos anni terminos, viz. centum ſolidos ad feſtum Pentecoſtes et centum ſolidos ad feſtum Sancti Martini in hieme, primo vero termino ſolutionis incipiente ad feſtum Pentecoſtes anno Domini milleſimo tricenteſimo viceſimo tertio, tenen. et haben. dictum annuum reditum decem librarum praefato domino Willielmo haeredibus ſuis et ſuis aſſignatis

assignatis quibuscunque libere quiete bene et in pace in perpetuum, ad quemquidem annuum reditum decem librarum fideliter et sine aliqua contradictione solvendum loco et terminis supra dictis ut praedicitur obligo pro me et haeredibus meis praedictam terram de Cartland et de Lay una cum omnibus bonis et catellis in iisdem terris inventis seu inveniendis ad districtionem praedicti domini Willielmi haeredum suorum vel suorum assignatorum quotiescunque defecero seu aliquis haeredum meorum defecerit in solutione dicti annui reditus decem librarum in toto vel in parte praedictis loco et terminis, tam ad restitutionem damnorum et expensarum si quae fuerint quam ad solutionem praedicti annui reditus nullo proponendo obstante. Ego vero Simon et haeredes mei praedicto domino Willielmo haeredibus suis et suis assignatis quibuscunque praedictum annuum reditum decem librarum, pro praedictae pecuniae summa in praedictis manibus ut praedictum est persoluta, contra omnes gentes warrantizabimus acquittabimus et in perpetuum defendemus. In cujus rei testimonium sigillum meum praesenti cartae apposui et ad majorem hujus rei evidentiam et sigilli mei testimonium nobilis vir dominus Walterus Seneschallus Scotiae ad instantiam meam sigillum suum huic cartae similiter apposuit. His testibus nobili viro domino Waltero Seneschallo superdicto, domino Gervaso abbate de Newbottle, domino Davide de Lindesay, domino de Crawford, domino Roberto de Herris, domino de Nidsdale, domino Richardo de Hay, domino Jacobo de Cuninghame, domino Adamo More, domino Jacobo de Lindsay, domino Waltero filio Gilberti, et domino Davide de Graham, militibus, et Reginaldo More, et multis aliis.

2. *Bond by James of Douglas Lord of Balvany, from the orinal, found among the papers of Baillie of Walſtoun.*

BE it kende till all men be thir preſent letteris me Jamis of Duglas lorde of Balwany ſekyrly to be haldyn and thrw thir preſent letteris lely to be obliſt tyll a worſchepyll man and my cuſing Schir Robert of Erſkyn lorde of that ilk in fourty pund of uſuale moneth of Scotland now gangand for cauſe of pure lane thrw the forſaide Schir Robert to me lent before hand in my gret myſter to be payt to the fornemmyt Schir Robert or tyll his ayre executuris or aſſignes at the feſt of Whitſonday and Martynmas in wynter nexit eftir the makyn of thir preſent letteris be evynlyk porciounis in maner and forme as eftir folous, that is to ſay, that all the landis of the barouny of Sawlyn with the appurtiones lyand within the ſchiradome of Fife the quhilkis I haf in intromettyng of Alexander of Halyburton lorde of the ſayd landis ſall remayne with the ſayde lorde with all fredomes esis & commoditeis courtis & playntis & eſchetis quhill he the ſaid lorde of Erſkyn his ayris executuris and aſſignes be fully aſſitht of xl. punde as is beforſayde. And gif it hapnes as God forbede that the ſaid Schir Robert be nocht aſſitht be ony manner of way of the ſaid landis of Sawlyn I the ſaid James oblis and byndis all my landis of the lordſchip of Dunſyare to be diſtrenzit als wele as the landis of Sawlyn at the wyll of the ſaid Schir Robert his ayris or aſſignes quhill he or thai be aſſitht of the forenemmyt ſowme as he or thai ſuld ſtrenze thair propir landis as for their awyn mail without leſe of oney juge ſeculer or of the kirk. In the witneſs of the quhilk thing to thir preſent letteris I haf ſett my ſele at Lynlithqw the aucht day of May the zere of grace MCCCC & XVIII.

NUMBER IV.

Old Style of Letters of POINDING THE GROUND, founded on the infeftment without a previous decree; referred to p. 179.

JAMES by the Grace of God, King of Scottis, to our lovites ——————— Andrew Foreman meſſenger our ſherriffs in that part conjunctly and ſeverally conſtitute, greeting. FORASMUCHAS it is humbly meant and ſhown to us, by our lovite oratrix and wido Katherine Greg the relict of umquhile Alexander Forreſter of Killennuch, THAT WHERE ſhe has the lands of Weſter Crow, with the pertinents, lying within the ſtewartry of Menteith, and ſheriffdom of Perth, pertaining to the ſaid Katherine in liferent, as her infeftment made thereupon bears: NOTTHELESS the tenants and occupiers of the ſaids lands reſts awind to her the mealls and duties thereof, of certain terms of langtime bypaſt, and will make no payment thereof unleſs they be compelled, to her heavy damage and ſkaith, as is alledged. OUR WILL is therefor, and we charge you ſtraitly and command, that, incontinent thir our letters ſeen, ye paſs, concurr, fortify, and aſſiſt the ſaid Katherine and her officiaris, in the poinding ad diſtrinzying the tenants and occupyers of the ſaids lands for the mealls farms and duties thereof, the two terms laſt bypaſt reſting awand by them, and make the ſaid Katherine to be paid thereof conform to her infeftment; and ſycklyke yearly and termly in time coming, and if need bees that ye poind and diſtrinzie therefor. ACCORDING to juſtice as ye will anſwer to us thereupon. The whilk to do we commit to you conjunctly

ly and ſeverally our full power, by thir our letters, delivering them, by you duly execute and indorſt, again to the bearer. Given under our ſignet at Edinburgh, the ſeventh day of December and of our reign the 30 zeir. *Ex deliberatione dominorum concilii.*

Signd J. WALLACE.

NUMBER V.

TAX granted by the PARLIAMENT to Robert I. for his life, referred to p. 200.

[*The original in the Advocates Library.*]

HOC eſt tranſcriptum indenturae concordatae et affirmatae inter Dominum Robertum Dei gratia Regem Scottorum illuſtrem, et comites, barones liberetenentes, communitates burgorum ac univerſam communitatem totius regni, magno ſigillo regni et ſigillis magnatum et communitatum praedictorum alternatim ſigillatum in haec verba: Praeſens indentura teſtatur, quod, quintodecimo menſis Julii anno ab incarnatione Domini M. CCC. viceſimo ſexto, tenente plenum parliamentum ſuum apud Cambuſkenneth ſereniſſimo Principe Domino Roberto Dei gratia Rege Scottorum illuſtri, convenientibus ibidem comitibus, baronibus, burgenſibus et ceteris omnibus liberetenentibus regni ſui, propoſitum erat per eundem Dominum Regem, quod terrae et redditus, qui ad coronam ſuam antiquitus pertinere ſolebant, per diverſas donationes et tranſlationes, occaſione guerrae

 factas,

factas, sic fuerant diminuti quod statui suo congruentem sustentationem non habuerit, absque intollerabili onere et gravamine plebis suae: Unde instanter petiit ab eisdem, quod cum tam in se, quam in suis, pro eorum omnium libertate recuperanda et salvanda, multa sustinuisset incommoda, placeret eis, ex sua debita gratitudine, modum et viam invenire per quem juxta status sui decentiam ad populi sui minus gravamen congrue posset sustentari. Qui omnes et singuli comites, barones, burgenses et liberetenentes, tam infra libertates quam extra, de Domino Rege, vel quibuscunque aliis dominis infra regnum mediate vel immediate tenentes, cujuscunque fuerint conditionis, considerantes et fatentes praemissa Domini Regis motiva esse vera, ac quamplura alia, suis temporibus, eis per eum commoda accreviſſe, suamque petitionem esse rationabilem atque justam, habito super praemissis commune ac diligenti tractatu, unanimiter gratanter et benevole concesserunt et dederunt Domino suo Regi supradicto annuatim ad terminos Sancti Martini et Pentecostes, proportionaliter, pro toto tempore vitae dicti Regis, decimum denarium omnium firmarum et redituum suorum, tam de terris suis dominicis et wardis quam de ceteris terris suis quibuscunque infra libertates et extra, ex tam infra burgos quam extra, juxta *antiquam extentam* terrarum et reddituum tempore bonae memoriae Domini Alexandri Dei gratia Regis Scottorum illustris ultimo defuncti, pro ministeriis ejus fideliter faciend. excepta tantummodo destructione guerrae; in quo casu fiet decidentia de decimo denario praeconcesso, secundum quantitatem firmae, quae occasione praedicta, de terris et redditibus praedictis, levari non poterint, prout per inquisitionem per vicecomitem loci fideliter faciendam poterit reperiri: Ita quod omnes hujusmodi denarii, in usum et utilitatem dicti Domini Regis, sine remissione

ſione quacunque cuicunque facienda, totaliter committantur: et ſi donationem vel remiſſionem fecerit de hujuſmodi denariis antequam in Cameram Regis deferantur et plenarie perſolvantur, praeſens conceſſio nulla ſit, ſed omni careat robore firmitatis. Et quia quidem magnates regni tales vendicant libertates, quod miniſtri Regis infra terras ſuas miniſtrare non poterint, per quod ſolutio Domino Regi facienda forſan poterit retardari; Omnes et ſinguli hujuſmodo libertates vendicantes, Domino Regi manuceperunt, portiones ipſos et tenentes ſuos contingentes, per miniſtros ſuos, miniſtris Regis, ſtatutis terminis plene facere perſolvi: Quod ſi non fecerint, vicecomites Regis quilibet in ſuo vicecomitatu, tenementa hujuſmodi libertatum, regia auctoritate, per hujuſmodi ſolutione facienda diſtringant. Dominus vero Rex, gratitudinem et benevolentiam populi ſui placide ponderans et attendens, eiſdem gratioſe conceſſit, quod a feſto Sancti Martini proximo futuro, primo viz. termino ſolutionis faciendae, collectas aliquas non imponet, priſas ſeu cariagia non capiet, niſi itinerando ſeu tranſeundo per regnum, more predeceſſoris ſui Alexandri regis ſupra dicti: Pro quibus priſis et cariagiis plena fiat ſolutio ſuper unguem: Et quod omnes groſſae providentiae Regis cum earum cariagiis, fiant totaliter ſine priſis. Et quod miniſtri Regis, pro omnibus rebus ad hujuſmodi groſſas providentias faciendas, ſecundum commune forum patriae, in manu ſolvant ſine dilatione. Ceterum conſenſum eſt et concordatum inter Dominum Regem et communitatem regni ſui, quod, ipſo Rege mortuo, ſtatim ceſſet conceſſio decimi denarii ſupradicti. Ita tamen quod de terminis praeteritis ante mortem ipſius Domini Regis plenarie ſatisfiat. Et quod nec per praemiſſa, vel aliquod praemiſſorum, poſt hujuſmodi conceſſionem finitam, haeredibus dicti Domini Regis aut

communitati regni ſui aliquatenus fiat praejudicium, ſed quod omnia in eundem ſtatum redeant et permaneant, in quo erant ante diem praeſentis conceſſionis. In quorum omnium teſtimonium, uni parti hujus indenturae, penes dictos comites, barones, burgenſes et liberetenentes reſidenti, appoſitum eſt commune ſigillum regni: Alteri vero parti, penes Dominum Regem remanenti, ſigilla comitum, baronum et aliorum majorum liberetenentium una cum communibus ſigillis burgorum regni, nomine ſuo et totius communitatis concorditer ſunt appenſa. Dat. die, anno et loco ſupradictis. Et hoc tranſcriptum penes magnates et communitates praedictos et eorum ſucceſſores, remanſurum, ſigillo regni conſignatur, in teſtimonium et memoriam futurorum. Datum apud Edinburgum, in parliamento Domini Regis tento ibidem, ſecunda Dominica quadrageſimae, cum continuatione dierum ſequentium, anno gratiae M. CCC. viceſimo ſeptimo.

NUMBER VI.

LORD LILE's Trial; referred to p. 285.

Parliament of King James III. holden at Edinburgh, 18th March 1481.

22 Martii quinto die parliamenti Domino Rege ſedente in trono juſticiae.

ASSISA.

Comes ATHOLIÆ	Dominus de DRUMLANGRIG
Comes de MORTON	Dominus MAXWELL
Dominus GLAMMIS	WILLIELMUS BORTHWICK Miles
Dominus ERSKINE	ALEXANDER Magiſter de Crawfurd
Dominus OLIPHANT	SILVESTER RATRAY de Eodem
Dominus CATHKERT	ROBERTUS ABERCROMMY de Eo-
Dominus GRAY	dem, Miles
Dominus BORTHWICK	DAVID MOUBRAY de Bernbougale,
Dominus de STOBHALL	Miles

Accuſatio ſuper Roberto Domino Lile per rotulos ut ſequitur.

ROBERT Lord LILE yhe ar dilatit to the King's heines that yhe have ſend lettres in England to the tratour James of Dowglace, and to uthir Ingliſmen in treſſonable maner; and alſo reſavit lettres fra y^e ſaid tratour, and fra uthir Ingliſmen in treſſonable manner and in furthering of y^e Kings enemys of England, and prejudice and ſkaith to our ſoverane Lord y^e King, his realme and liegis.

Quae aſſiſa ſupraſcripta in praeſentia ſupremi domini noſtri regis jurata, et de ipſius mandato ſuper dictam accuſationem cognoſcere per eundum ſupremum dominum noſtrum regem mandata, remota et reintrata deliberatum eſt per os Joannis Drummond de Stobhall, nomine et ex parte dictae aſſiſae et prolocutorio nomine ejuſdem, dictum Robertum Dominum Lile quietum fore et immunem et innocentem accuſationis et calumpniationis ſupraſcript. Super quibus dictus Robertus dominus Lile petiit notam curiae parliamenti et teſtimonium ſub magno ſigillo ejuſdem domini noſtri regis ſibi dari ſuper praemiſſis, quodquidem teſtimonium idem dominus rex ſibi conceſſit, darique mandavit eidem in forma ſupraſcripta et conſueta.

NUMBER VII.

Carta CONFIRMATIONIS * Gilberti Menzeis; referred to p. 336.

JACOBUS, Dei gratia, rex Scotorum, omnibus probis hominibus totius terrae ſuae, clericis et laicis, ſalutem: Sciatis nos, quandam literam per Robertum de Keth militem, et Alexandrum de Ogilvy de Inverquhardy, vicecomites noſtros de Kincardin deputatos, ſigillis eorum ſigillatam, factam Gilberto Menzeis burgenſi burgi noſtri de Aberdeen, in Curia capitali apud Bervy tenta, anno et die infraſcripta litera expreſſis, penes proſecutionem, dicti Gilberti contra Joannem de Tulch de Eodem, et Walterum de Tulch filium ſuum, per brevem

* Lib. 4. No. 49. 1450, July 22.

vem compulſionis capellae noſtrae, per dictum Gilbertum impetratum de ſumma centum et ſexaginta librarum uſualis monetae regni noſtri; et penes alienationem terrarum de Portarſtone et de Orcharfeldie infraſcriptarum, cum pertinen. de mandato noſtro, viſam, lectam, inſpectam et diligenter examinatam, ſanam, integram, non raſam, non cancellatam, ac in aliqua ſui ſuſpectam, ſed omni prorſus vitio et ſuſpicione carentem ad plenum intellexiſſe, ſub hac forma: Till all and ſundrie thir preſent letteris ſall heer or ſee, Robert maſter of Keth knight, and Alexander of Ogilvy of Inverquhardy ſherive deputes of Kincardin, greiting, in God ay leſtand, till zour univerſitie we mak knawin, That in y^e ſhirriff-court be us haldin at Inverbervy y^e 28 day of the month of May, the zeir of our Lord 1442 zeiris, Gilbert Menzeis burges of Aberdeen followit Johne of Tulch of that Ilk, and Wat of Tulch his ſon, be the Kings brevis of compulſione upon a ſome of viii ſcore of punds of the uſuale mony of Scotlande, the quhilk ſome the foirſaide Johne and Wat war awande to the foirſaide Gilbert conjunctly bundyn be thair obligationes, and the quhilk ſome, after lauchfull proceſſe maide, y^e foirſaid Gilbert optenit and wan lauchfulli befoir us in jugement, for the payment of the y^e quhilks to the ſaid Gilbert to be maide, we, of autority of our office, and at command of our liege Kings precepts thairupone till us directit, findand no guidis of the foirſaide Johne nor Wat within our ſhirriffdome to mak the payment foirſaide, gert our mairs ſet a ſtrop upon the landis of y^e Porterſtoun and of the Orchardfeldie, and gert preſent to the four heid courts next thairaftir halden at Kincardine erd and ſtane, and proferit that landis to ſell for the payment of the foirſaide ſome; and at the laſt curt, quhen zire and day was paſſit, and the procis lauchfullie provit in the curt, the

foirſaide Wat of Tulch maide inſtance, to gar that actione be deleyit, in the plyght it then was to the next heide curt, thair to be haldin after zule; at the quhilk heide curt haldin at Kincardine the 13 day of the month of Januar, the zire of our Lord 1443, baith perties appeirit in jugement, and thair the foirſaide Gilbert aſkit us fullfilling of law and payment to be maide him, and thairupon preſent us our liege Kings precepts of commandment, to the quhilks we, riply aviſit with men of law, Gert cheſe upe an aſſiſe of the barony of the Merns, the grete ath ſworne, gerte tham gang out of curt to pryſe to the foirſaide Gilbert als meikle land as might content him lauchfully of the ſome foirſaide; the quhilk aſſiſe well avyſit income and deliverit, that the foirſaide Gilbert ſulde have, as his awn propir landis, the landis of Porterſtone and the landis of Orcharfelde, with yair pertinents be tham priſit and extendit till aucht pundis worth of land for hale payment of the aucht ſcore pundis foirſaide; and we, of autority of our office, deliverit to the foirſaide Gilbert in playne curt, the landis foirſaide, to brouke and to joyſe as his awn propir landis; and for the mair ſykernes we gert our mair Tome Galmock gang with the foirſaide Gilbert to the foirſaide landis and gif him heritable ſtate and poſſeſſione: The quhilk poſſeſſione was gevin in preſence of Hew Aberuthno of that ilk, Johne Biſſit of Kinneffe, Will. of Strathachin, Johne of Pitcarne, Ranald Chene, and mony uthers, and this till all that it effeiris or may effeir in tyme to cum we make knawyne be thir preſent letteris, to the quhilks we have put to our ſellis, the zire, day, and place foirſaide. Quamquidem literam ac omnia et ſingula in eadem contenta in omnibus ſuis punctis et articulis conditionibus et modis ac circumſtantiis ſuis quibuſcunque forma pariter et effectu in omnibus et per omnia approbamus,

approbamus, ratificamus, et pro nobis heredibus et ſucceſſoribus noſtris, ut premiſſum eſt, pro perpetuo confirmamus, ſalvis nobis haeredibus et ſucceſſoribus noſtris, wardis, releviis, maritagiis, juribus et ſervitiis de dictis terris ante preſentem confirmationem nobis debitis et conſuetis. In cujus rei teſtimonium preſenti cartae noſtrae confirmationis magnum ſigillum noſtrum apponi precipimus: teſtibus reverendis in Chriſto patribus Willielmo et Johanne Glaſguen. et Dunkelden. aeccleſiarum epiſcopis, Willielmo domino Crichton noſtro cancellario et conſanguineo, predilecto cariſſimo conſanguineo noſtro Willielmo comite de Duglas et de Anandale, domino Galvidiae, venerabili in Chriſto patre Andrea abbate de Melros noſtro confeſſore et theſaurario, dilectis conſanguiniis noſtris Patricio domino Glamis magiſtro hoſpitii noſtri, Patricio domino de Graham, Georgeo de Chrichton de Carnis admiralo regni noſtri, David Murray de Tulibardyn, militibus, magiſtris Joanne Arons archideaconen. Glaſguen. et Georgeo de Schoriſwod rectore deculture clerico noſtro. Apud Striviline, viceſimo ſecundo die menſis Julii, anno Domini Mcccc quinquageſimo, et regni noſtri decimo quarto.

NUMBER VIII.

ACT OF WARDING; referred to p. 346.

At the day of
One thouſand ſeven hundred and ſeventy one.

THE which day ſitting in judgement;
compeared and made faith;
That he had ſearched and ſought for the goods and gear of the defender in order to have poinded and appriſed the ſame, at the inſtance of the purſuer for payment of the ſums reſting, decerned, and charged for; but could get none poindable to the value thereof: Therefore the Bailies ordain their officers to paſs, ſearch, ſeek, take, and apprehend, the perſon of the ſaid and put him in ſure ward, firmance, and captivity, within the tolbooth of this city, therein to remain, upon his own proper charges and expences, ay and while he make payment of the ſums reſting and charged for, conform to the before-written decreet and execution, in all points. Extracted.

NUMBER IX.

LETTERS of FOUR FORMS, iſſued on the debtor's conſent; referred to p. 355.

JAMES, by the grace of God, King of Scottis, to oure lovittis Robert Howieſon meſſenger, ——— meſſengeris, our ſherriffis in that part conjunctlie and ſeverallie

ſeverallie ſpeciallie conſtitute, greiting: FORASMEIKLEAS it is humbly meint and ſhawin to us, be oure lovitt Henrie Leirmonth, ſerviter for the tyme to umquhill meſter David Borthuick of Bowhill, oure advocate for the tyme: THAT QUHAIR thair is ane contract and appointment maid betwix Johnne Forreſt Proveſt of oure burgh of Linlitgow, and Helen Cornwall his ſpouſs as principalis, and Jerom Henderſon cautioner for thaim on the ane parts, and the ſaid Henry on the other pairt, of the dait att oure ſaid burgh of Linlitgow the 16th day of November, in the zeir of God 1576 zeirs; be the quhilk contract the ſaid Johnne and his ſaid ſpouſs ſalde and analeit heretablie ane annualrent of twelve punds monie of our realm zeirly, to be uplifted at Whit. and Mart. be equal portions, furth of all and haill thair four acres of land, callet the Lonedykes, lyand within the territorie and oure Sherrifdome of Linlitgow, boundet as is containit in the ſaid contract, and to warrant the ſaim to the complainer frae all wardis, relieves, nonentries, and otheris inconvenientis whatever, at length ſpecified and containit thairintill: LIKEAS they and thair cautioner forſaid ar bund and oblieſt conjunctlie and ſeverallie for them and thair aires, to mak thankfull payment zeirly to the ſaid Henry of the ſaid annualrent, frae the dait of his infeftment unto the lawfull redemtion of the ſamen, and to fulfill divers and ſundrie utheris headis, pointis, parts, and clauſis, ſpecified and containit in the ſaid contract, to the ſaid Henry, for thair pairt, as the ſamen at more length proportis; quhilk contract is actit and regiſtrat in the Lordis buiks of our counceil and ſeſſion, and decernit to haiff the ſtrenth of thair act and decreet, with letteris and executorials of horning or poinding to paſs and bee direct thairupon, at the ſaid Henries will and pleiſer, as the ſaids Lordis decreet interponit thereto,

to, of the dait the tenth day of June 1581 zeirs, at lenth proportis: NOTTHELESS the ſaid Johnne Forreſt, his ſpouſs and cautioner forſaid, will not obſerve keep and fulfill the forſaid contract and appointment to the ſaid Henrie, in all and ſundrie pointis and clauſis thereof, as ſpecially to mak paiment to him of the ſaid annualrent of twelve punds monie forſaid, reſtand awand to the ſaid complainer of all zeirs and terms bygane, frae the daite of the ſaid contract, and ſyklike zeirly and termly in time coming, during the nonredemtion thairof, the termis of paiment being bypaſt conforme thairto, without they be compellit. * OURE WILL IS HEIRFOR, and we charge you ſtrictly, and commandis, that incontinent thir oure Letters ſeen, ye paſs, and, in our name and authority, command and charge the ſaid Johnne Forreſt, Helen Cornwall his ſaid ſpouſs, and the ſaid Jerom Henderſon thair cautioner forſaid, conjunctly and ſeverally, to obſerve keip and fulfill the forſaid contract and appointment to the ſaid Henry Leirmonth, in all and ſundrie pointis partis and clauſis thereof, and ſpecially to mak payment to him of the ſaid annualrent of twelve punds monie forſaid, reſtand awand to him, of all zeirs and termis bygane, and ſyklyke zeirly and termlie in tyme coming, during the nonredemtion of the ſamen, conform to the ſaid contract, and the ſaids Lordis decreit forſaid interponit thairto as ſaid is, within thrie days nixt after they be chargit be you thairto, under all higheſt paine and chairge that after may follow. THE SAIDS thrie days being bypaſt, and the ſaids perſons diſobeyand, † That ye chairge them zit as of before, to obſerve, keip, and fulfill the forſaid contract and appointment to the ſaid Henry, in all and ſundrie pointis, partis and clauſis thairof, and ſpeciallie to mak paiment to him

* Firſt Form. † Second Form.

him of the ſaid annualrent of twelve punds money forſaid, reſtand awand, of all zeirs and termis bygane, and ſyklyke zeirly and termlie in tyme comeing, during the nonredemtion thairof, conform to the ſaid contract, and decreit forſaid interponit thairto as ſaid is, within other 3 dais next after they be chargit be you thairto, under the paine of wairding thair perſonis. The Quhilks thrie days being bypaſt, and the forſaids perſonis diſobeyand, * That ze chairge the diſobeyeris zit as of before, to obſerve keip and fulfill the ſaid contract and appointment to the ſaid Henrie, in all and ſundrie pointis pairtis and clauſis thairof, and ſpeciallie to mak payment to him of the ſaid annualrent of twelve punds money foreſaid, reſtand awand, of all zeirs and termis bygane, and ſyklyke zeirlie and termlie in tyme coming during the nonredemption thairof, conform to the ſaid contract and decreit forſaid interponit thairto as ſaid is, within other thrie dais next after they and ilk ane of them be chargit be zou thairto; or elſe that they within the ſamin thrie dais, paſs and enter thair perſonis in waird within oure caſtell of Dumbartane, thairin to remain upon their awin expenceſs ay and quhill they have fulfillit the comande of thir our letteris, and be freid be us thairfrae, under the pain of rebellion and putting of thaim to our horn; and that they cum to oure ſecretar or his deputtis, keipars of oure ſignet, and receive our other letteris for thair reſaite in waird within oure ſaid caſtell. The Quhilks thrie dais being bypaſt, and the ſaids perſonis or ony of thaim diſobeyand, † That ze chairge the diſobeyeris zit as of before, to obſerve, keip, and fulfill the ſaid contract and appointment to the ſaid complainer, in all and ſundrie pointis partis and clauſis thairof; and ſpeciallie to make payment to him of the ſaid annualrent of

* Third Form. † Fourth Form.

of twelve punds money forſaid, reſtand awand to him, of all zeir and termis bygane; and ſiklike zeirly and termlie in tyme coming, during the nonredemtion thairof, conform to the ſaid contract and decreit forſaid interponit thairto, as ſaid is, within other three dais next after they be chargit be zou thairto; or elſe that they, within the ſamen three dais, paſs and enter thair perſonis in waird, within our ſaid caſtell of Dumbartane, thairin to remaine upon thair awn expenceſs, ay and quhill they have fulfillit the command of thir our letteris, and be freid be us thairfre, under the ſaid paine of rebellion and putting of them to our horne; and that they cum to our ſaid ſecretar, or his deputtis, keipars of oure ſaid ſignete, and reſaive oure ſaid other letteris for thair reſaite in waird within oure ſaid caſtell. THE QUHILK laſt three dais of all being bypaſt, and the ſaids perſonis or ony of thaim diſobeyand, and not fulfilland the command of thir oure letteris, nor zit enterand thair ſaids perſonis in wairde within oure ſaid caſtell as ſaid is, * That ze, incontinent thairafter, denunce the diſobeyeris our rebellis, and put thame to oure horne; and eſcheat and inbring all thair movable guidis to oure uſe for thair contemption; and immediately after zour ſaid denunciation, that ze mak intimation to the Schyrriff of oure Schyre whair our ſaids rebellis is, and ſyklyke to our theſaury and his clerkis, conform to oure act of parliament made thairanent. According to juſtice, as ze will anſwer to us thairupon; the quhilk to do, wee comitt to you conjunctly and ſeverally our full power be thir our letters, delivering thaim be zou duely execute and indorſit againe to the bearer. Given under our ſignet att Edinburgh, the 17th day of *Junii*, and of our reign the 19th zeir 1586.

Ex deliberatione Dominorum concilii.

* Warrant to denounce.

The Executions written on the back thus :

* Upon the 21 day of the month of Aprile, in the zeir of God 1591 zeirs, I Robert Howiſon meſſenger, paſt, att command of thir our ſoveraign Lordis letteris within-written, to the dwelling-houſe of Helen Cornwall, within the burgh of Linlitgow, relict of umquhill Johnne Forreſt of Magdalane perſonallie, and ſyklike, to the dwelling-houſe of Jerom Henderſon as cautioner and ſourtie for the ſaid John Forreſt and Helen Cornwall his relict, and I, conform to the tenor of the firſt charge containit in thir letteris within written, in our ſoveraign Lordis name and authoritie, commandit and chargit the forſaid Helen Cornwall and Jerom Henderſon the cautioner perſonally, conjunctly and ſeverally, to obſerve, keep and fulfill the contract and appointment aforſpecifyed, to Henry Leirmonth complainer, in all pointis partis and clauſis containit thairintill, and ſpecially to mak payment to him of the annualrent of xii *libs* money forſaid, reſtand awand to him, of all zeirs and termis bygane, conform to the tenor of the letteris, and ſylyke zeirly in time coming during the nonredemtion of the landis containit in the forſaid contract, and the Lordes decreit interponit thairto, within thrie days nixt after this my charge, under the heigheſt paine and chairge that after might follow; and this I did conform to the tenor of the firſt charge in all points, before theſe witneſſes, &c. Sign'd by the meſſenger only, and ſealed.

Upon

* Execution of Firſt Form.

* Upon the 28 day of the month of Aprile, I Robert Howiſon meſſenger, zit as of before, paſt att command of thir oure ſoveraign Lordis letteris afforſpecifyed, and I perſonally apprehended Helen Cornwall relict of umquhill John Forreſt and Jerom Henderſon the cautioner, and I, conforme to the tenor of the ſecond chairge contaınit thairintill, commandit and chargit thaim, and ilk ane of thaim, in all pointis, and this within other thrie dais nixt after this my chairge, under the paine of wairding of thair perſonnis: This I did before theſe witneſſes, &c. And for verification of this my ſecond chairge I have ſubſcribit the ſamin, and affixit my ſignet thairto. Signed and ſealed as before.

† Upon the 3d day of the month of May, and yeir of God aforwritten, I Robert Howiſon meſſenger, zit as of before, paſt to the perſonal preſence of Helen Cornwall relict of umquhile John Forreſt, and ſyklyke to the perſonal preſence of Jerom Henderſon, and I, conforme to the tenor of the third charge containit in the former letteris, commandit and chargit them, in our ſoveraign Lordis name, to obſerve the ſamin within other thrie dais, or elſe that thay within the ſaid thrie dais paſs and enter thair perſonis in waird within the caſtell of Dumbartane, thair to remain upon thair own expenceſs ay and quhile they have fulfillit the command of thir letteris, and be freed orderlie thairfrae, under the paine of rebellion and putting of thaim to the horne, and that they cum to the ſecretar or his deputtis, keepars of the ſignette, and reſaive other letteris for thair reſaite and waird within the ſaid caſtle: And this I did conform to the tenor of the third chairge containit thairintill in all pointis. And this I did before thaiſe witneſſes, &c. Signed by the meſſenger only and ſealed.

Upon

* Of Second. † Of Third.

* Upon the 8th day of the month of May, and zeir of God foreſaid, I Robert Howiſon meſſenger, zet as of before, paſt to the perſonal preſence of Helen Cornwall relict of umquhill John Forreſt, and ſyklyke to the perſonal preſence of Jerom Henderſon the cautioner, and I, conform to the tenor of the fourth chairge containit in the former letteris, I commandit and chargit them, in oure ſoveraign Lordis name and authoritie, to obſerve the ſamen within letteris thrie dais next after my chairge, or elſe that they within the ſaid thrie days paſs and enter thair perſonnis in waird within the caſtell of Dumbartane, thair to remain upon their ain expences ay and while they hae fulfillit the command of thir letteris, and freed orderlie thairfrae, under the pain of rebellion and putting of them to the horne, and that they cum to the ſecretar, keipar of the ſignet, and reſaive other letteris for their reſaite and ward within the ſaid caſtell: And this I did conform to the tenor of the fourth chairge containit thairintill in all pointis. This I did before thir witneſſes, &c. Sign'd, &c. as before.

† Upon the 21 day of the month of May, and zeir of God foreſaid, I Robert Howiſon meſſenger, perſonally apprehended Helen Cornwall foreſaid and Jerom Henderſon, and I maide intimation to ilk ane of thaim, that I would denounce them oure ſoveraign Lordis rebellis, and put them to his heighneſs horn. This I did before thir witneſſes, &c. Sign'd by the meſſenger, but not ſealed.

‡ Upon the 22 day of the month of May and zeir of God foreſaid, I Robert Howiſon meſſenger, paſt to the mercate-corſe of the burgh of Linlitgow, and thair, be

* Of Fourth. † Intimation. ‡ Denunciation.

open proclamation be thrie blaſts of ane horne, as uſe is, I denounced, and put to oure ſoveraign Lordis heighneſs horne, Helen Cornwall relict of umquhill John Forreſt, and Jerom Henderſon the cautioner, and this conform to the tenor of thir letteris in all partis: This I did before thir witneſſes, &c. And for the verification of this and my former executions I haive ſubſcribit thir preſents with my hand, and affixit my ſignet thairto, Sign'd, &c.

Apud Linlitgow, die ſexto menſis Junii 1591, *regrat. per*

Notes of Letters of Four Forms,

* JAMES, &c. Foraſmeikleas (here is narrated a decreit obtain'd before the commiſſars of Edinburgh, att the inſtance of Robert White, againſt Sir James Crichton, decerning him to pay L. 162 Scots of principal, and L. 4 of expences; and that Robert White had thereupon raiſed the commiſſar's precept, and cauſed chairge the ſaid Sir James Crichton to pay to him the ſaids ſums, within 15 days, under the pain therein contain'd, as the ſaid precept, ſhawin to the Lords, &c. teſtified: In and to which decreet precept and ſums Robert Scott, &c. has right by aſſignation, &c. notwithſtanding whereof the ſaid Sir James Crichton has noways fulfillit, nor will fulfill to the ſaid complainer as aſſigney forſaid, the forſaid decreet and precept raiſed thereupon, without he be furder compellit.) Our will is, &c. command and chairge the ſaid Sir James Crichton to content and pay to the ſaid complainer, the ſums of money above written,

* Regiſtered 19th Sept. 1610.

ten, after the form and tenor of the ſaid decreet and precept in all points, within 3 days next after the charge, under all higheſt pain, &c. which 3 days being paſt, to charge him within other 3 days. And ſo on as in common letters of 4 forms.

There is another regiſtred 12th September, at the inſtance of James Wardlaw, againſt James Earle of Murray, proceeding upon a decreet before the Lords of councill and ſeſſion, for 4000 merks, dated 2d March 1610, which decreet the ſaid Earle will not obtemper and fulfill. Our will, &c. charge him within three days, &c. as in common letters of four forms. Given under our ſignette, penult day of *Maii*, *&c.* 1610.

Ex deliberatione Dominorum concilii.

This it ſeems has paſt upon a bill, although proceeding upon a decreet of the Lords.

NUMBER X.

Carta RICARDI KINE * ; referred to p. 373.

JACOBUS, &c. Quia direximus literas noſtras Vicecomiti noſtro de Selkrig, ad inveſtigandum et perquirendum terras *quondam* Patricii Wallance, ubicunque infra bondas officii, et appretiari faciendum eaſdem in quantum ſe extendunt, pro relevio dilecti Ricardi Kine, noſtri coronatoris Vicecomitatus de Selkrig, de ſumma viginti librarum, in qua adjudicatus erat pro dicto Patricio ſecundum tenorem acti adjornalis noſtri, prout in eiſdem literis noſtris ſub ſigneto noſtro deſuper decretis plenius continetur. Pro quarum executione Joannes Murray de Fallahill, Vicecomes noſter deputatus de Selkrig, accedens invenit unam terram huſbandiam nuncupatam Burges Walleys in burgo noſtro de Selkrig, eidem *quondam* Patricio in haereditate ſpectantem. Et ibidem, apud capitale meſſuagium dictae terrae huſbandiae, dictus noſter Vicecomes deputatus *haeredes dicti quondam* Patricii, et ceteros omnes ad praefatam terram intereſſe habentes, legitime premonuit, viceſimo die menſis Septembris 1508, ad comparendos coram ipſo vicecomite, vel deputatis ſuis, ſuper ſolum dictae terrae, tertio die menſis Octobris anno praeſcripto, au audiendum prefatam terram huſbandiam appretiari, pro relevio dicti Ricardi et terrarum ſuarum, quae pro dicta ſumma L. 20, appretiatae fuerunt. Quo tertio die Octobris dictus noſter vicecomes deputatus comparuit ſuper ſolum dictae terrae huſbandiae, et ad capitale meſſuagium, ejuſdem, curiam Vicecomitatus noſtri de Selkrig affirmari fecit, et in eadem, *haereditibus*

* Lib. 16. No. 77. 1508. 29th January.

bus dicti Patricii et caeteris omnibus ad prefatas terras intereſſe habentibus, ad audiendum eandem terram ut praemittitur appretiari, legitime vocatis, et non comparentibus, dictus noſter vicecomes, per tres decem condignas perſonas ad hoc electas, pro predicta ſumma L. 20, eo quod dicta terra huſbandia ad viginti ſolidos terrarum ſe extendit, legitime appretiari fecit. Qua quidem terra ſic ut praemittitur appretiata, dictus vicecomes eandem *haeredibus dicti quondam Patricii*, ſeu cuicunque ipſam pro predicta ſumma emere volenti, publice vendendam obtulit. Et quia nullam perſonam dictam terram pro praefata pecunia emere volentem invenit, idem noſter vicecomes, virtute ſui officii, praedictam terram huſbandiam aſſignavit dicto Ricardo, in plenariam contentationem et ſolutionem dictae ſummae viginti librarum, pro ipſius relevio de eadam, ſecundum tenorem acti noſtri parliamenti. Volumus et ordinamus quod haeredes dicti quondam Patricii habeant regreſſum per ſolutionem infra ſeptennium.

Number XI.

Charter of Apprising * ; referred to p. 377.

MARIA, &c. omnibus, &c. ſciatis quia literas noſtras, per dilectum clericum conſiliarumque noſtrum magiſtrum Henricum Lauder, noſtrum advocatum, impetratas, dilectis noſtris Willielmo Champnay nuncio vicecomiti noſtro in hac parte et aliis direximus, mentionem in ſe proportantes, quod ipſe noſter advocatus decretum

* Thirty-firſt Book of Charters, No. 294.

cretum coram concilii noſtri dominis contra et adverſus Matheum Comitem de Levinax nuper obtinuit, noſtras literas ſuper ipſo decernentes ad compellendum, namandum, et deſtringendum ipſius terras et bona pro ſumma L. 10,000, monetae regni noſtri, ſecundum formam ſuae obligationis in libris concilii noſtri regiſtrat. prout hujuſmodi decretum latius proportat. Et quia dictus comes introitum ad terras ſuas et hereditates tempore promulgationis dicti decreti minime obtinuit, ſed ad fruſtrandam executionem ejuſdem ad eaſdem intrare noluit, idem noſter advocatus, per ſupplicationem noſtri concilii dominis porrectam, alias noſtras literas impetravit, virtute quarum dictum comitem precepit, quatenus ad predictas ſuas terras et hereditates intra viginti et unam dies intraret, ad effectum, ut hujuſmodi decretum debite executioni demandaretur, eidem certificantes, quod ſi in id defecerit, lapſis dictis viginti et una diebus, quod praedictae ſuae terrae et hereditates, pro ſolutione dictae ſummae, eodem modo ſicut ad eaſdem introitum habuiſſet, nobis appretiarentur, et appretiatio earundem ita legitima foret, ac ſi dictus comes introitum ad eaſdem legitime habuiſſet, prout prefatae aliae literae noſtrae in ſe latius proportant. Quibus idem comes obtemperare minime voluit, prout in hujuſmodi noſtris literis, et in earundem executione, plenius continetur. QUAPROPTER dicti comitis terrae et hereditates pro dicta ſumma appretiari debebunt, veluti in eiſdem infeodatus hereditarie fuiſſet, et terrae ejuſdem quas dictus advocatus appretiari cauſaret, jacentes infra vicecomitatum noſtrum de Renfrew, et ob magnas curas nobis pro publica concernentis ſibi commiſſas in iſtis partibus tractandas, pro dictis terris appretiandis, ad vicecomitem noſtrum de Renfrew antedictum accedere minime poterat, ideo alias literas noſtras, dicto Willielmo et aliis ſuis collegis vicecomitibus noſtris in hac parte,

parte, direximus ad denunciandas terras et hereditates dicti Matthei comitis, pro dicta ſumma nobis appretiari; et ad hunc effectum curias infra praetorium noſtrum de Edinburg. affigere et tenere, et ibidem ſupra appretiatione earundem procedere, ac ſi dictus comes legitimum introitum habuiſſet ſecundum tenorem aliarum noſtrarum literarum prius deſuper directis, et ad praemoniendum eundem, per publicam proclamationem apud cruces forales burgorum noſtrorum de Renfrew et de Edinburgo reſpective, ſuper 60 dierum premonitione, ad videndum et audiendum hujuſmodi appretiationem legitime fieri et deduci, eo quod ipſe comes nunc extra regnum noſtrum extat, et penes loco deſuper diſpenſando, et predictum pretorium noſtrum de Edinburgo et crucem foralem ejuſdem, ita legitima pro hujuſmodi appretiationis deductione ſint, quam pretorium et crux foralis burgi noſtri de Renfrew ubi predictae terrae jacent, pro cauſis ſuprascriptis admittendo, prout in dictis noſtris literis memorato Willielmo et ſuis collegis deſuper directis latius continetur. Virtute quarum—and ſo the charter goes on to mention the denunciation of the lands to be appriſed, and the appriſing of the ſame, 13th May 1544, and the allowance of the appriſing, and the giving the land to the Maſter of Semple, &c. dated 24th May 1547.

Ex. G. A. A.

FINIS.

BOOKS written by the ſame Author; printed for BELL and BRADFUTE, and W. CREECH, Edinburgh, and T. CADDEL, STRAND, London.

Dictionary of Deciſions, 2 vols fol.

Remarkable Deciſions, 1716—1728. fol.

——————— Deciſions, 1730—1752. fol.

Select Deciſions, 1752—1768, fol.

Statute-law of Scotland abridged; with Hiſtorical Notes, 8vo. Edit. 2.

Elucidations of the Law of Scotland. 8vo.

Eſſays on Britiſh Antiquities. Edit. 3. 12mo.

Principles of Morality and Natural Religion. 8vo. Edit. 3.

Elements of Criticiſm. 2 vols 8vo. Edit. 6.

Sketches of the Hiſtory of Man. 4 vols 8vo. Edit. 3.

Introduction to the Art of Thinking. 12mo. Edit. 3.

Looſe Hints upon Education, chiefly concerning the Culture of the Heart. Edit. 2.

Eſſays upon ſeveral ſubjects in Law. 8vo.

The Gentleman Farmer, being an attempt to improve Agriculture, by ſubjecting it to the teſt of rational principles. 8vo. Edit. 3.